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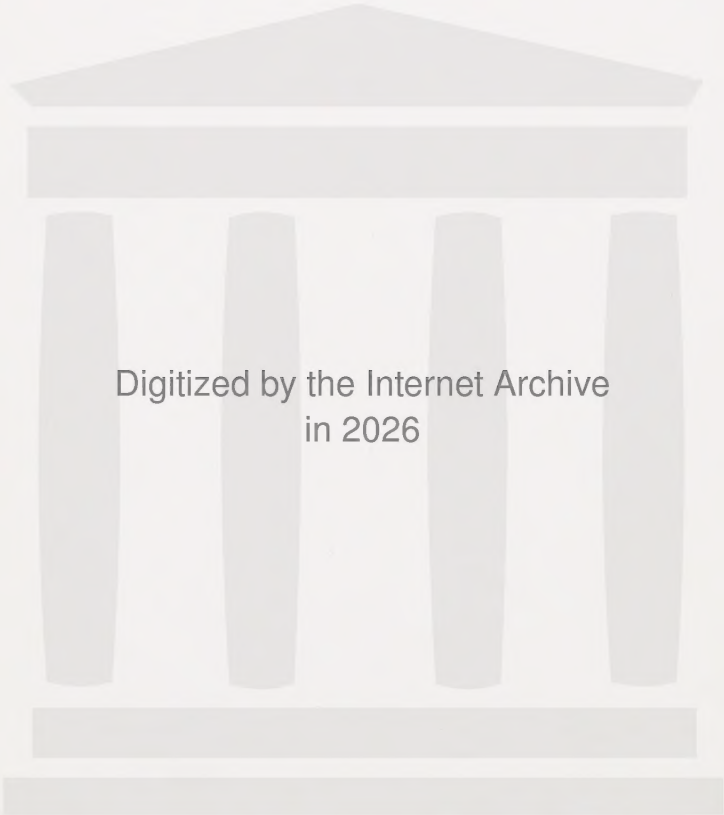
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A SELECTION OF CASES

IN

EQUITY JURISDICTION

WITH NOTES AND CITATIONS

BY

JAMES BARR AMES

BUSSEY PROFESSOR OF LAW IN HARVARD UNIVERSITY

VOL. I—PARTS I-VI

DR. NORMAN A. WIGGINS

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CASES IN EQUITY JURISDICTION.

CHAPTER I.

NATURE OF EQUITY JURISDICTION.

J. R. *v.* M. P. and Others.

In the Common Bench, Hilary Term, 1459.

[*Year Book, 37 Henry VI., folio* 13, *placitum* 3.]

Debt upon an obligation by J. R. of London against M. P. and J. B., citizens and aldermen of London.[1]

Choke, for the defendants. The action lies not; for formerly, on such a day in the feast of the Holy Trinity, in the year last past, the said defendants made a bill to the Chancellor of England containing the matter following: that the defendants had purchased of J. R. certain debts due to him, giving their obligation therefor; that these debts being only choses in action could not vest in the defendants so as to give them any action for the recovery of the debts, but the duty remained all the time in J. R., so that the defendants had no *quid pro quo;* that their obligation was, on this account, void and worthless, but that the common law gave them no relief against their obligation; wherefore they prayed for a writ against J. R. to appear, under a certain penalty, before the king in Chancery to answer to this matter. A *subpena* issued. The parties appeared, and because the matter was doubtful in law, the Chancellor [Waynflete] adjourned them to the Exchequer Chamber. There the matter was rehearsed and well debated before him and the justices of both benches. And it was the opinion of all the justices that, as no duty was vested in the defendants by the bargain, the obligation ought in conscience to be surrendered to them, or the plaintiff ought to release the defendants. The Chancellor ordered him to give up the obligation to be cancelled in the Chancery or to make an acquittance or release. The plaintiff refusing to do either, was committed for contempt to the Fleet prison until he should obey, and still remains there. And we do not think an action lies upon the obligation.

Demurrer. And now a supersedeas is issued out of Chancery.

Billing, for the plaintiff.

The decree is not that the obligation is null and void in law, but that the plaintiff shall bring it in to be cancelled. This proves clearly that the obligation is in force until cancelled. The bar is bad.

[1] The report of this case is somewhat condensed. — Ed.

Littleton. I think otherwise, and that the bar is good. What was done in Chancery was by the advice of all the justices, and by the order to bring in the obligation to be cancelled, the obligation loses its force. For as soon as he brings it in, the Court will cancel it or redeliver it to the defendants, and so in effect it is null and void in law.

Laicon, contra. Sir, the decree is merely that he bring in the obligation to be cancelled, so it is clear that it is still in force. For if the obligation by this decree had lost its force, the plaintiff would not be ordered to prison.

Bocf. It is proved that the obligation is not yet surrendered, but remains with the plaintiff. Therefore it is still in force, and that is why he is still in prison.

NEEDHAM, J. The matter is [not ?] a bar, because the obligation is still in force.

DANBY, J. By the decree the obligation loses its force as fully as if it had been cancelled.

MORTON, J., to the same effect.

DANVERS, J. This is not like an obligation made by an infant, or under duress. In those cases the obligation is void; not so here. The plea is bad.

ASHTON, J., *contra.* The decree is the same in effect as if it had ordered that the obligation should be null and void.

PRISOT, C. J. In the use of writs of *subpena* the Chancery is not a court of record, for it is only to examine the conscience. We here are bound to the law, and cannot go beyond. It belongs to them to examine the conscience. For when the deed is good and always has been so, their examination will not make it bad, nor will their examination make it good and legal in our law. And since the defendants cannot have any remedy by our law, they shall sue there to be restored to their obligation; and the effect of their power and decree is to restore the party to his obligation, or to compel the plaintiff to make an acquittance or release. But to execute this, the Chancery can do nothing but order him to prison, there to remain until he will obey. And this is all that court can do. And if the party will lie in prison rather than give up the obligation, the other is without remedy, and so the Chancellor has no power to nullify the obligation.[1]

[1] In the summary of this case in Jenk. Cent. Cas. 108, pl. 9, the reason for rejecting the plea is expressed as follows: "For the Common Law proceeds upon certain fixed and invariable rules; the Chancery proceeds at the discretion of a good man. A decree there binds the person to obedience, but does not at all operate upon the matter in question."

The same distinction between law and equity is expressed by Knightly, sergeant at law, in Y. B. 27 Hen. VIII. f. 15, pl. 6: "A decree is not like a judgment in the King's Bench or Common Bench, for such a judgment binds the right of the party; but a decree does not bind the right, but only the person to obedience, so that if the party will not obey, then the Chancellor may commit him to prison until he will obey, and this is all that the Chancellor can do."

In Platt *v.* Woodruff, 61 N. Y. 378, a creditor had obtained a judgment in violation of an injunction restraining him from prosecuting his action against the debtor. The court, while recognizing that the creditor might be restrained from realizing the fruit of his judgment, decided that it was not a void judgment. — ED.

WINSTON *v.* WESTFELDT.

SUPREME COURT, ALABAMA, JUNE TERM, 1853.

[22 *Alabama Reports*, 760.]

ERROR to the Circuit Court of Mobile.

Tried before the Hon. LYMAN GIBBONS.

Assumpsit by George Westfeldt against Augustus A. Winston, on a promissory note for $2156\frac{10}{100}$ executed by said Winston and others, dated June 13, 1848, payable three years after date to the order of Jonathan Bliss, negotiable and payable at the bank of Mobile. The plaintiff declared as endorsee of said Bliss.

The facts proved on the trial were substantially as follows: The Tombigbee Bank of Mississippi held a claim against one Lacy, which was in the hands of Jonathan Bliss for collection. This claim was compromised, and the note now sued on was received in part payment of it, Lacy being one of the makers of the note. The Tombigbee Bank failed, and made an assignment of its assets to one Murdock, to whom Bliss delivered the note in suit, having endorsed it in blank; and, before its maturity, it came to the hands of Westfeldt by purchase; but from whom he purchased does not appear. Before Westfeldt's purchase, however, certain creditors of the Tombigbee Bank had instituted proceedings in the Chancery Court of Sumter, to condemn the amount due on the notes received by Murdock from Bliss to the satisfaction of their debts. The bill sets out the compromise of Lacy's indebtedness to the bank, and alleges that the assignment to Murdock was fraudulent. Lacy, Bliss, Murdock, and the bank are made defendants to the bill; and an order was made, in the progress of the cause, enjoining the transfer by Bliss of Murdock's notes. Service was perfected on the defendants; and a decree was rendered condemning the notes, and directing the master to ascertain and report the amount due from Lacy to the bank, and from the bank to the complainants. The master's report under this reference was made and confirmed; and, in pursuance of this decree, Lacy paid to the complainants the amount of the note now sued on, having been indemnified. Westfeldt purchased the note on the 16th of March, 1850, a few days after the confirmation of the master's report, and while said chancery suit was under an order of continuation for further proceedings as to other parties.

Upon this state of facts, the court charged the jury that the plaintiff was entitled to recover.[1]

GOLDTHWAITE, J.

Neither does the fact, that an injunction against negotiating the note was in force, destroy its negotiability. We do not understand

1 The arguments are omitted, together with a part of the opinion, in which the court decided that the doctrine of notice of *lis pendens* does not apply to negotiable paper. — ED.

any of the authorities to go to that length; and the same reasons exist to sustain it in the hands of a *bona fide* holder, as in the case of *lis pendens*. The party, it is true, would be placed by the injunction in a better condition, as the chancellor could commit for the breach, until the party who negotiated the note had got it back into his possession, or paid the amount due upon it; but the injunction could not operate to destroy the qualities which the law attaches to the instrument itself.

It is, however, urged on the part of the plaintiff in error, that as Westfeldt sues as the endorsee of Bliss, and the evidence shows that he did not become the holder of the note until after the rendition of the decree against Lacy, he is bound by it, as the privy of Bliss, who was a party defendant to the chancery proceeding. It is true, as a general rule, that a judgment or decree is binding on parties and privies; but, technically speaking, there can be no privity where there is not an identity of interest. 1 Green. Ev. 523, § 190. Usually as the assignee of a chose in action takes it subject to all the equities, he has precisely the same interest as the assignor; but this is not the case with negotiable paper, taken before maturity, for value, and without notice. The holder, under such circumstances, may have very different rights from the party from whom he received it, and can recover while his assignor could not. This is the case here. Neither Bliss nor Murdock could recover, because they are not *bona fide* holders, while Westfeldt, upon the evidence, must be regarded as such; and in this respect his interest is not identical with theirs, and he is not bound by the decree.

Our decision upon these points is conclusive of the case, and renders it unnecessary to consider any of the other questions presented in argument.

The judgment is affirmed.[1]

NOTE.

In the Common Pleas, Trinity Term, 1626.

[*Littleton*, 37.]

If judgment be given in an action at common law, the Chancellor cannot alter or meddle with the judgment, but he may proceed against

[1] Carroll Co. *v.* Smith, 111 U. S. 556; Durant *v.* Iowa Co., 1 Woolw. 69; Lindley *v.* Diefendorf, 43 How. Pr. 357 *Accord*.

If the party enjoined disobeys the injunction, with the consent of the person at whose suit it issued, no stranger can take advantage of this disobedience. If, for instance, a creditor procures an injunction against any conveyance of his debtor's property, but afterwards, before the injunction is dissolved, sanctions a conveyance, the other creditors can derive no benefit by reason of the injunction. Herman *v.* Sartor (Tenn. 1901), 63 S. W. R. 1120; Greenwald *v.* Roberts, 4 Heisk. 494; Wilhoit *v.* Castill, 59 Tenn. 419. — Ed.

the person for corrupt conscience, because he will take advantage of the law against conscience.[1]

[1] Injunctions against the enforcement of judgments obtained fraudulently were issued from early times. Armburgh *v.* Bernard (Henry VI.), 2 Cal. ch. xiv.; Anon. (1470), Y. B. 9 Ed. IV. 2 5; Reed *v.* Capel, Y. B. 7 Hen. VII. 10–2; Cotes *v.* Preston (1558), Ch. Cas. Ch. 109; Allen *v.* Dingley (1576), Ch. Cas. Ch. 113; Snagg's Case (1576), Ch. Cas. Ch. 114; Oxford's Case (1615), 1 Ch. Rep. 1.

But Coke denied the power of Chancery to interfere with the execution of common law judgments. In Heath *v.* Ryley (1613), Cro. Jac. 335, 1 Bulst. 194 s. c., he gave judgment although the plaintiff was forbidden to enter it after verdict in his favor, and in Courtney *v.* Glanvil (1614), Cro. Jac. 343, 2 Bulst. 301, 1 Roll. R. 111 s. c., his court admitted to bail a judgment creditor who had been committed to the Fleet for disobeying an injunction. There were precedents for such action by a common law court in Russell's case (1483), Y. B. 22 Ed. IV. 37-20; Humfrey *v.* Humfrey (1471), Dal. 81, 3 Leon. 18 s. c.; Austen *v.* Brereton (1587), Cro. Car. 596 cited.

The following account of the notable contest between Lord Coke and Lord Ellesmere is taken from Wilson's Life of James I., pp. 94, 95: —

"A little before this time there was a breach between the Lord Chief Justice Cook and the Lord Chancellor Ellesmer, which made a passage to both their declines. Sir Edward Cook had heard and determined a Cause at the Common Law, and some report there was jugling in the business. The witness that knew, and should have related the Truth, was wrought upon to be absent, if any man would undertake to excuse his non appearance. A pragmatical fellow of the party undertook it, went with the witness to a Tavern, called for a Gallon pot full of Sack, bid him drink, and so leaving him went into the Court. This witness is called for as the prop of the Cause, the Undertaker answers upon Oath, He left him in such a condition, that if he continues in it but a quarter of an hour, he is a dead man. This evidencing the mans incapability to come, deaded the matter so, that it lost the Cause. The Plaintiffs that had the Injury bring the business about in Chancery; the Defendants (having had Judgment at Common Law) refuse to obey the Orders of that Court, whereupon the Lord Chancellor for contempt of the Court commits them to prison. They petition against him in the Star-Chamber, the Lord Chief Justice joyns with them, foments the difference, threatning the Lord Chancellor with a Premunire. The Chancellor makes the King acquainted with the business, who sent to Sir Francis Bacon his Attorney General, Sir Henry Montague, and Sir Randolph Crew his Serjeants at Law, and Sir Henry Yelverton his Sollicitor, commanding them to search what Presidents there have been of late years, wherein such as complained in Chancery were relieved according to Equity and Conscience, after judgment at Common Law. These being men well versed in their Profession (after canvassing the matter throughly) returned answer to the King, That there hath been a strong current of Practice and proceeding in Chancery, after Judgment at Common Law, and many times after Execution, continued since Henry the sevenths time, to the Lord Chancellor that now is, both in the Reigns (seriatim) of the several Kings, and the times of the several Chancellors, whereof divers were great learned men in the Law; it being in Cases where there is no Remedy for the Subject by the strict course of the Common Law unto which the Judges are sworn. This satisfied the King, justified the Lord Chancellor, and the Chief Justice received the foil; which was a bitter potion to his spirit, but not strong enough to work on him as his Enemies wished."

See, also, 2 Campbell, Lives of the Lord Chancellors, 241.

As late as 1647 in Anon. Sty. 27: "All the judges agreed that an injunction out of Chancery lies not after a judgment." But this statement in Style, as well as similar expressions in subsequent cases (More *v.* Douglas, Hardr. 23; King *v.* Standish, 1 Lev. 241, 243; King *v.* Welby, T. Ray. 227), had no effect upon the practice of issuing injunctions against the execution of judgments at law. Lord Ellesmere's triumph was complete. — Ed.

PEGGE *v.* SKYNNER AND RICHARDSON.

IN CHANCERY, BEFORE LORD THURLOW, C., MAY 22, 1784.

[1 *Cox, Equity Cases*, 23.]

BILL for specific performance of an agreement for a lease from plaintiff to defendants. It was objected that the defendant Richardson had since become incapable of doing any act in consequence of a paralytic stroke. It was ordered that Skynner should execute a counterpart of a lease, and also the defendant Richardson, when he should be capable of so doing.[1]

Lord Thurlow refused to give the plaintiff costs.

GARDNER *v.* OGDEN.

COURT OF APPEALS, NEW YORK, DECEMBER TERM, 1860.

[22 *New York Reports*, 327.]

APPEAL from the Supreme Court. Action to avoid a deed as fraudulently obtained from the plaintiff, and to compel the defendant Smith to reconvey to the plaintiff the real estate therein described.

DAVIES, J. The first question necessary to be considered is, whether the Supreme Court had jurisdiction of the subject-matter of this action.[2] That court, under the reorganization of the judicial system of this State, under the Constitution of 1846, succeeded to all the powers of the Court of Chancery, and to all the jurisdiction which it

[1] Owen *v.* Davies, 1 Ves. 82; Hall *v.* Warren, 9 Ves. 605 *Accord.*

It was frequently desirable to have the title held by a lunatic trustee transferred. But apart from statutes, equity was powerless to grant any decree other than one like that in the principal case. The difficulty was removed, in England, as to express, bare trustees, by St. 4 Geo. II. c. 10; 6 Geo. IV. c. 79, § 3. By the Trustee Act of 1850, § 3, the equity judges were authorized to vest the title of a lunatic trustee in a suitable person, whether the trust was express or constructive, and whether the trustee was a bare trustee or beneficially interested. See, also, the Lunacy Act of 1890, §§ 135, 136. There are similar statutes in this country. Pub. St. Mass. 141, § 22; Merrill *v.* Beck, 163 Mass. 503; *Re* Wadsworth, 2 Barb. Ch. 281; Swartout *v.* Burr, 1 Barb. 495.

There was a similar difficulty in divesting an infant trustee of his title to the trust property. Anon. 3 P. Wms. 389 n. [A]. St. 7 Anne, c. 19, and St. 6 Geo. IV. c. 74, § 2, provided a remedy in the case of infants who were bare, express trustees, and the Trustee Act of 1850, 12 & 13 Vict. c. 74, § 7, empowered the Court of Chancery to vest the title of an infant trustee, whether beneficially interested or not, and whether the trust was express or constructive, in a suitable person. There is similar legislation in this country. Hawthorn *v.* Root, 6 Bush, 501; Walsh *v.* Walsh, 116 Mass. 377; Bridges *v.* Bidwell, 20 Neb. 185; *Re* Follen, 14 N. J. Eq. 147; Ownes *v.* Ownes, 23 N. J. Eq. 60; Livingston *v.* Livingston, 2 Johns. Ch. 537; Thompson *v.* Dulles, 5 Rich. Eq. 370. Such legislation has, of course, no extra-territorial effect. Sutphen *v.* Fowler, 9 Paige, 280. — ED.

[2] Only so much of the opinion as relates to this question is given. —ED.

possessed and was accustomed to exercise. This question caused embarrassment to the special term in this case; and it seemed to doubt its power to order in direct terms the defendants, or either of them, to reconvey the premises deeded by the plaintiff to Smith, on the ground that the court had no jurisdiction, for the reason that the lands, the subject-matter of the action, were situated without the boundaries of the State. The Supreme Court, at general term, in its opinion, says: "If the sale to Smith could be avoided on the ground of the relation in which he stood to Ogden, Jones & Co., the action for that purpose should have been prosecuted against Smith alone, and before some tribunal having cognizance of the subject-matter of the action. The premises being in another State, an action for their recovery cannot be successfully prosecuted in this court." In this view of the authority of the Supreme Court to entertain this action, we think the learned courts below fell into a grave error. It is true that, by section 123 of the Code, actions for the recovery of real property must be tried in the county in which the subject of the action is situated. The Supreme Court of this State, as a court of equity, could not, therefore, take jurisdiction of an action for the recovery of lands situated in another State, where the proceeding was *in rem;* but where it has jurisdiction of the proper parties, it may, by its judgment or decree, compel them to do equity in relation to lands located without its jurisdiction. The court, in such a case, acts *in personam.* We regard this as so well settled by authority, that it cannot longer be seriously questioned. A review of the authorities in England and this country will, we think, place this matter beyond all doubt. In Archer *v.* Preston, in which case, if in any, the jurisdiction was local, the matter there being not only for land that lay in Ireland, but of a title under the act of settlement there, yet the defendant coming into England, a bill was exhibited against him there, and a *ne exeat regno* granted, and he put to answer a contract made for those lands. This case is cited by Lord Chancellor Nottingham in Count Arglasse *v.* Muschamp,[1] and by Lord Keeper North in S. C.[2] Arglasse *v.* Muschamp was a case in which the plaintiff exhibited his bill to be relieved against an annuity or rent-charge made upon lands in Ireland, on the ground that the same was obtained by fraud. The defendant pleaded to the jurisdiction of the court that, the lands lying in Ireland, the matter was properly examinable in the Court of Chancery there, and that that court in England ought not to interpose. The Lord Chancellor said: "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands, and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you you must not intermeddle here, because the fraud, though committed here, con-

[1] 1 Vern. 75. [2] 1 Vern. 135.

cerns lands that lie in Ireland, which makes the jurisdiction local, and so would wholly elude the jurisdiction of this court. But," he adds, "they certainly forget the case of Archer and Preston;" and the plea was overruled, and the defendant ordered to pay costs for endeavoring to oust the court of its jurisdiction. This was in Michaelmas term, 1682. Lord Nottingham died in December of that year, and was succeeded by Lord Chief Justice North as Lord Keeper. In the succeeding term (Hilary, 1682) a petition was presented to the Lord Keeper by the defendant for a rehearing of his plea to the jurisdiction of the court; but it was not allowed; the Lord Keeper citing only Preston and Archer's case. In the case of Earl of Kildare *v.* Eustace,[1] the plaintiff's bill was to be relieved touching the trust of certain lands in Ireland. The defendants had appeared, and had not objected to the jurisdiction of the court; and the case coming on to be heard, the Lord Chancellor, Jeffries (in Michaelmas term, 1686), objected that the court could not hold pleas of lands in Ireland. The plaintiff's counsel insisted that he was entitled to relief in that court by reason that both plaintiff and defendant were there in England, and that a court of equity does only *agere in personam;* and the counsel instanced the precedents of Arglasse *v.* Muschamp, and Arglasse *v.* Pitt,[2] and Archer's case, and insisted there would be a failure of justice if the action was not sustained. But the Lord Chancellor overruled the plaintiff's counsel, and said, in the cases of Lord Arglasse the fraudulent contracts were made here in England, and thereupon pronounced a rule for dismissing the bill, but, upon the importunity of the plaintiff's counsel, gave them a week's time to search for precedents. The same case again came up on the 3d of December following, when the Lord Chancellor and the judges then attended with precedents, and Sir John Holt argued for the plaintiff the preliminary point only, to wit, whether the court had jurisdiction and might hold pleas of the lands which lay in Ireland. The defendant's counsel in a manner waived the preliminary point, and would not enter into the debate whether the court might not decree the trust of lands in Ireland, the trustee living here. After a long debate the judges, concurring with his lordship that the court had a proper jurisdiction in that case, made a decree for the plaintiffs. Toller *v.* Carteret was heard before Lord Keeper Cowper, in May, 1705. The defendant Carteret was the owner of the Isle of Sarke, and made a mortgage thereon to one Willows, the plaintiff's intestate, for five hundred years, for £500. A bill was filed in the Court of Chancery in England that the defendant might redeem or be foreclosed. The defendant pleaded to the jurisdiction of the court, that the island of Sarke was part of the Duchy of Normandy, and had laws of their own, and was under the jurisdiction of the courts of Guernsey, and not within the jurisdiction of the Court of Chancery. The Lord Keeper overruled the plea, because the grant was of the whole island, and, secondly, that the Court of Chancery had also jurisdiction, the

[1] 1 Vern. 404.

[2] 1 Vern. 238.

defendant being served with the process here, *et æquitas agit in personam.* The case of Lord Baltimore *v.* William Penn,[1] is worthy of attentive consideration. This was a bill filed in Chancery for a specific performance of articles settling the boundaries of the colonies of Maryland and Pennsylvania, made and executed between the respective proprietors thereof. Lord Harwicke fully sustains the jurisdiction of the Court of Chancery, and says: "The conscience of the party was bound by this agreement, and being within the jurisdiction of this court, which acts *in personam*, the court may properly decree it as an agreement, if a foundation for it." In answer to the arguments that the court had no means to enforce its decree, he says: "If they could not at all, I agree it would be in vain to make a decree, and that the court cannot enforce their own decree *in rem* in the present case; but that is not an objection against making a decree in the cause, for the strict primary decree in this court, as a court of equity, is *in personam*. . . . In Lord King's time, in the case of Richardson *v.* Hamilton, Attorney-General of Pennsylvania, which was a suit of land and house in the town of Philadelphia, the court made a decree that it could not be enforced *in rem.* In the case of Lord Anglesey, of lands lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree *in rem;* but the party being in England, I could enforce it by process of contempt *in personam* and sequestration, which is the proper jurisdiction of the court." To the same point may be cited the cases of Earl of Derby *v.* Duke of Athol,[2] Lord Cranstown *v.* Johnson,[3] and Lord Portarlington *v.* Soulby. The case of Massie *v.* Watts[4] is quite in point. There a bill was filed in the Circuit Court of Kentucky against the defendant, a citizen of Kentucky, to compel him to convey to the plaintiff lands in the State of Ohio to which the defendants had obtained the legal title, the plaintiff claiming to be equitably entitled thereto. The Circuit Court sustained the bill, and made a decree that the plaintiff recover of the defendant Massie the lands claimed, and convey the same to him; and that upon such conveyance being made, the plaintiff should assign to the defendant all his claim to another quantity of land mentioned in the decree. From this decree an appeal was taken to the Supreme Court of the United States, and there affirmed. Marshall, Ch. J., in delivering the opinion, says: "Where the defendant in the action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practised on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found; and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest jurisdiction."

In Farley *v.* Shippen,[5] the Court of Chancery in Virginia held that

[1] 1 Ves. Sr. 444. [2] 1 Ves. Sr. 202. [3] 3 Ves. Jr. 170.
[4] 6 Cranch, 148 [5] 1 Wythe's R. 254.

it had jurisdiction to enforce a trust in relation to lands lying in North Carolina, the defendants being amenable to its process. To the same effect is the case of Guerrant *v.* Fowler.[1] So, also, Hughes *v.* Hall.[2]

The current of decision in this State, upholding the jurisdiction of our courts upon this question, has been uniform. The jurisdiction of the court was distinctly affirmed by Chancellor Sanford, in Ward *v.* Arredondo.[3] In that case, the land was in the State of Florida, and the parties in this State; and the bill was filed to cancel a deed and restrain an agent of the grantor from parting with it. I am unaware that the authority of this case has ever been questioned in this State: on the contrary, it has been frequently affirmed. Mead *v.* Merritt & Peck;[4] Mitchell *v.* Bunch;[5] Sutphen *v.* Fowler;[6] Shattuck *v.* Cassidy & Smith;[7] De Klyn *v.* Watkins *et al*;[8] Newton *v.* Bronson.[9]

These cases must be held to establish the jurisdiction of the Supreme Court, in the present case, on an impregnable basis, and that the court, having jurisdiction of the party in whom the legal title to the land in controversy is vested, may, by its process of attachment and injunction, compel him to do justice by the execution of such conveyances and assurances as will affect the title to them in the State of Illinois.[10]

[1] 1 Hen. & M. 5.
[2] 5 Munf. 431.
[3] Hop. R. 213.
[4] 2 Paige, 402.
[5] 2 Id. 606.
[6] 9 Id. 280.
[7] 3 Edw. 152.
[8] 3 Sand. Ch. R. 185.
[9] 3 Kern. 587.

[10] "The courts of equity in England are, and always have been, courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not locally or *ratione domicilii* within their jurisdiction." *Per* Lord Selborne, in Ewing *v.* Ewing, 9 Ap. Cas. 34, 40.

The doctrine that a court of equity may decree a conveyance of property lying in another jurisdiction, whether the duty to convey arises from contract or from a trust, express or constructive, is universally recognized. Archer *v.* Preston, 1 Vern. 77, cited; Arglasse *v.* Muschamp, 1 Vern. 75, 135, 237, 2 Ch. Rep. 266 s. c.; Kildare *v.* Eustace, 1 Vern. 405, 419, 2 Ch. Ca. 188 s. c.; Angus *v.* Angus, West *t.* Hard. 23; Penn *v.* Baltimore, 1 Ves. Sr. 444; Cranston *v.* Johnston, 3 Ves. Jr. 170, 5 Ves. 277; Jackson *v.* Petrie, 10 Ves. 164; *Ex parte* Pollard, Mont. & Ch. 239 (reversing s. c. 3 Mont. & A. 340); Ewing *v.* Ewing, 9 Ap. Cas. 34, 40; Massie *v.* Watts, 6 Cranch, 148; Pennoyer *v.* Neff, 95 U. S. 714, 723; Cole *v.* Cunningham, 133 U. S. 107, 117, 118; Briggs *v.* French, 1 Sumn. 504; McLean *v.* Lafayette Bank, 3 McL. 587; Montgomery *v.* U. S., 36 Fed. R. 4; Romer *v.* McKay, 54 Fed. R. 432; Lynde *v.* Columbus Co., 57 Fed. R. 993; Municipal Co. *v.* Gardiner, 62 Fed. R. 954; Guarantee Co. *v.* Delta Co., 104 Fed. R. 5, 10; Stapler *v.* Hurt, 16 Ala. 799; Pickett *v.* Ferguson, 45 Ark. 177, 213; McGee v. Sweeney, 84 Cal. 100; Smith *v.* Davis, 90 Cal. 25; Farmers' Co. *v.* Postal Co., 55 Conn. 334, 335; Moore *v.* Jaeger, 2 McArth. 465; Cooley *v.* Scarlett, 38 Ill. 316; Johnson *v.* Gibson, 116 Ill. 294; Baker *v.* Rockabrand, 118 Ill. 365; Cloud *v.* Greasley, 125 Ill. 313; Hayes *v.* O'Brien, 149 Ill. 403, 410; Sturdevant *v.* Pike, 1 Ind. 277; Bethell *v.* Bethell, 92 Ind. 318; MacGregor *v.* MacGregor, 9 Iowa, 65, 78; Gilliland *v.* Inabit, 92 Iowa, 46; Blackman *v.* Wright, 96 Iowa, 541, 551; McQuerry *v.* Gilliland, 89 Ky. 434; Hayden *v.* Yale, 45 La. Ann. 362 (*semble*); Reed *v.* Reed, 75 Me. 264; Eaton *v.* McCall, 86 Me. 346, 358; White *v.* White, 7 Gill & J. 208, 211; Stansbury *v.* Fringer, 11 Gill & J. 149; Davis *v.* Parker, 14 All. 94, 98; Brown *v.* Desmond, 100 Mass. 267; Dunlop *v.* Byers, 100 Mich. 108; Noble *v.* Grandin (Mich. 1900), 84 N. W. 465; Olney *v.* Eaton, 66 Mo. 563; March *v.* Eastern Co., 40 N. H. 548, 575; Wood *v.* Warner, 15 N. J. Eq. 81; Davis *v.* Healey, 22 N. J. Eq. 115, 120; Potter *v.* Hollister, 45 N. J. Eq. 508, 514; Vreeland *v.* Vreeland, 49 N. J. Eq. 322; Lindley *v.* O'Reilly, 50 N. J. Eq. 636; Mitchell *v.* Bunch, 2 Paige, 606; Shattuck *v.* Cassidy, 3 Edw. 152; Hawley *v.* James, 7 Paige, 213; Sutphen *v.* Fowler, 9 Paige, 280; De Klyn *v.* Watkins, 3 Sandf. Ch. 185; Newton *v.* Bronson, 13 N. Y. 587; Sloan *v.* Bird,

HART *v.* SANSOM AND ANOTHER.

SUPREME COURT, UNITED STATES, JANUARY 21, 1884.

[110 *United States Reports*, 151.]

MR. JUSTICE GRAY delivered the opinion of the court.[1]

This is a writ of error sued out by Edmond J. Hart, a citizen of Louisiana, to reverse a judgment rendered against him in the Circuit Court of the United States for the Northern District of Texas, in an action brought by him against Marion Sansom and the heirs at law of Thomas M. League, citizens of Texas, to recover a tract of land in Johnson County, in that State, of which they had dispossessed him.

At the trial, Hart proved his title under a patent from the Republic of Texas to League, and a deed with general covenants of warranty from League, dated August 19th, 1846, and both recorded on December 9th, 1879; and it appeared that the defendant Sansom held possession of the land under a lease from the other defendants, and as their tenant.

The heirs at law of League had filed a petition, June 11th, 1873, in the District Court of Johnson County, against Wilkerson, Dorsey, Hart, and others, praying that certain pretended claims and recorded deeds in favor of the defendants might be declared fraudulent and void, that this cloud upon the plaintiffs' title might be removed by the cancellation of the said deed, and that the plaintiffs have a writ of possession. The citations were duly served upon all the defendants, those upon Hart and Dorsey, who were non-residents, being served by publications. Judgment was rendered August 24th, 1875, "that the several deeds in the plaintiffs' petition mentioned, be, and the same are hereby, annulled and cancelled, and for naught held, and the cloud thereby removed."

The Circuit Court, against the plaintiff's objection, admitted the judgment in evidence, instructed the jury that it divested the plaintiff of his title to the land, and directed a verdict for the defendants.

The plaintiff, deriving his title under a deed with covenants of

162 N. Y. 327, 331; Myers *v.* De Mier, 4 Daly, 343; Buel *v.* Baltimore Co., 24 N. Y. Misc. Rep. 327; Orr *v.* Irwin, 2 Car. L. Repos. 465; Blount *v.* Blount, 1 Hawks, 365, 376; Penn *v.* Hayward, 14 Oh. St. 302; Burnley *v.* Stevenson, 24 Oh. St. 474; Vaughan *v.* Barclay, 6 Whart. 392; Clad *v.* Paist, 181 Pa. 148, 154; Episcopal Church *v.* Wiley, 2 Hill, Ch. 584; Johnson *v.* Kimbro, 3 Head, 557, 559; Parker *v.* Parkes, 3 Tenn Ch. 647, 648; Miller *v.* Birdsong, 7 Baxt. 531; Pickett *v.* Ferguson, 86 Tenn. 648; Paschal *v.* Acklin, 27 Tex. 173, 192; Farley *v.* Shippen, Wythe (2d ed.) 254; Guerrant *v.* Fowler, 1 Hen. & M. 4; Dickinson *v.* Hoomes, 8 Grat. 453; Poindexter *v.* Burwell, 82 Va. 507; State *v.* Superior Court, 7 Wash. 306, 307.

In Wicks *v.* Caruthers, 13 Lea, 353, the court declined to decree a conveyance by one residing beyond the jurisdiction, although personally served within its jurisdiction. But see *contra* Matteson *v.* Schofield, 27 Wis. 671, in which case under similar circumstances the court made a decree, which, by the statute, executed itself, the land being within the jurisdiction of the court. — ED. 2 Page 606-16; 1 Gray 4'4; 148 Mass

[1] The first part of the opinion, stating the facts of the case, is somewhat abridged. — ED.

general warranty from League, is entitled to maintain this action against League's heirs, who are estopped by those covenants, unless the former judgment in the action brought by them in the state court has adjudicated the title as between them and the present plaintiff. It is therefore necessary to consider the nature and effect of that judgment.

The petition combined, in accordance with the practice prevailing in that State, an action in the nature of ejectment to recover possession of the land, and a suit in equity to remove a cloud upon the plaintiffs' title; and the service by publication was in the form authorized by the local statutes against non-residents. 1 Paschal's Digest of Laws of Texas (4th ed.), art. 25.

The petition alleged that Wilkerson was in possession; and that the other defendants, except Hart, held recorded deeds, which were fraudulent and void, and cast a cloud upon the plaintiffs' title. But as to Hart, it did not allege that he was in possession, or was in privity with the other defendants, or that he held any deed, but only that he set up some pretended claim and title. And the verdict finds that he claimed the land, but had no title of record or otherwise therein. The judgment is that the plaintiffs recover the land of the defendants, and that the deeds mentioned in the petition be and are annulled and cancelled, and the cloud thereby removed, and for costs; and execution is awarded for costs only, and not for any writ or process in the nature of a writ of possession or *habere facias*.

It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession; and that part which removes the cloud upon the plaintiffs' title appears to be limited to the cloud created by the deeds mentioned in the petition, and the petition does not allege, and the verdict negatives, that Hart held any deed.

But if there is any judgment (except for costs) against Hart, it is, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title, and is no bar to the present action.

Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. Langdell Eq. Pl. (2d ed.) §§ 43, 184; Massie *v.* Watts;[1] Orton *v.* Smith;[2] Vandever *v.* Freeman.[3]

[1] 6 Cranch, 148. [2] 18 How. 263. [3] 20 Tex. 334.

It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. Felch *v.* Hooper;[1] Ager *v.* Murray.[2] But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts *in personam*, by compelling a deed to be executed or cancelled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title.

In the judgment in question, no trustee to act in behalf of the defendant was appointed by the court, nor have we been referred to any statute authorizing such an appointment to be made. The utmost effect which can be attributed to the judgment, as against Hart, is that of an ordinary decree for the removal by him, as well as by the other defendants, of a cloud upon the plaintiff's title.

Such a decree, being *in personam* merely, can only be supported, against a person who is not a citizen or resident of the State in which it is rendered, by actual service upon him within its jurisdiction; and constructive service by publication in a newspaper is not sufficient. The courts of the State might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other State; and it is of no greater force, as against a citizen of another State, in a court of the United States, though held within the State in which the judgment was rendered. Hollingsworth *v.* Barbour;[3] Boswell *v.* Otis;[4] Bischoff *v.* Wethered;[5] Knowles *v.* Gaslight Company;[6] Pennoyer *v.* Neff.[7] See, also, Schibsby *v.* Westenholtz;[8] The City of Mecca.[9]

The Circuit Court having ruled and instructed the jury otherwise, its judgment must be reversed, and the case remanded with directions to set aside the verdict, and to order a *new trial*.[10]

1 119 Mass. 52. 2 105 U. S. 126, 132. 4 Pet. 466, 475
4 9 How. 336. 5 9 Wall. 812. 6 19 Wall. 58.
7 95 U. S. 714. 8 L. R. 6 Q. B. 155. 9 6 P. D. 106.

10 Clark *v.* Hammett, 27 Fed. R. 339; Spurr *v.* Scoville, 3 Cush. 578; Pitts *v.* Clay, 27 Fed. R. 635 *Accord*.

It is hardly necessary to add that a decree against a person within the jurisdiction as to foreign land does not change the legal title. Watkins *v.* Holman, 10 Pet. 25, 37; Carpenter *v.* Strang, 141 U. S. 87; Dull *v.* Blackman, 169 U. S. 243; Remer *v.* Mackay, 35 Fed. R. 86; Guarantee Co. *v.* Delta Co. 104 Fed. R. 5; Vreeland *v.* Vreeland, 49 N. J. Eq. 322; Lindley *v.* O'Reilly, 50 N. J. Eq. 636; Burnley *v.* Stevenson, 24 Oh. St. 474, 478. — Ed.

34 Miss 357; 70 272; 52 U.S. 492-512; 132 Ill. 467-481-2.

JOHN H. DILLON *v.* MARTIN HELLER.

SUPREME COURT, KANSAS, JANUARY TERM, 1888.

[39 *Kansas Reports*, 599.]

ACTION brought by Martin Heller against John H. Dillon, to quiet the title to lot number 10, block number 33, in the city of Anthony, in Harper County. Personal service of summons could not be obtained upon the defendant in Kansas; hence the service was made by publication. A motion to quash the service by publication, on the ground that the court cannot acquire jurisdiction by such service in cases to quiet title, was overruled. The defendant brings the case to this court for review.[1]

The opinion of the court was delivered by

VALENTINE, J.: The plaintiff in error, who was defendant below, claims that the court below erred in the following particulars and for the following reasons, to wit:

"1. That service of summons by publication in actions to 'quiet title' is not sufficient to give the court jurisdiction of the party defendant.

"2. That the court, not having jurisdiction of the party defendant, cannot pronounce judgment in the matter."

While the plaintiff in error does not in terms claim that a court cannot in any case where the defendant is a non-resident and out of the state, obtain jurisdiction to hear and determine the case by virtue of a service of summons only by publication, yet such is the result of his argument; and in support of such argument he cites a number of authorities, the principal of which is the case of Hart *v.* Sansom. We do not think, however, that the authorities cited go to the extent claimed for them. Of course a court cannot obtain jurisdiction of the person of a non-resident defendant by means only of a service of summons by publication, nor can a court obtain jurisdiction of the person of any person who is a non-resident and out of the state, by any kind of service, or by any kind of process or notice; for the jurisdiction of the courts of any sovereignty can never extend beyond the domain of the sovereignty which creates them. Amsbaugh *v.* Exchange Bank.[2] No court in Kansas can compel a non-resident defendant out of the state to come within its territorial boundaries, or to submit himself to its jurisdiction, or to do or perform any other act or thing; but this lack of power on the part of the court does not depend upon the character of the service of process made upon the defendant, but it arises from the well-established doctrine that the jurisdiction of one sovereignty (through its courts or otherwise)

[1] The statement is somewhat abridged, and a part of the opinion not relating to the question of jurisdiction is omitted. — ED.

[2] 33 Kan. 100, 105.

cannot extend into the territorial boundaries of another sovereignty. Therefore, for the purposes of this case, it will be admitted that the court below did not have jurisdiction of the person of the defendant below, plaintiff in error. But that does not settle this controversy. The court below had jurisdiction of something. It had jurisdiction of the plaintiff below, and it had jurisdiction of the subject-matter of the action. This latter proposition, however, is questioned. Jurisdiction is of two kinds: jurisdiction of the person, and jurisdiction of the property or thing in controversy; or, in other words, jurisdiction *in personam* and jurisdiction *in rem;* and jurisdiction in either case is sufficient to authorize a valid judgment to be rendered. Now it may be admitted, for the purposes of this case, and is admitted, that the old equitable action to quiet title to real estate was purely an action *in personam;* and indeed it will be admitted that originally every action in equity was purely an action *in personam,* but such is not the case under the statutes of this state, and such is not the case with respect to the present action. The present action is purely a *statutory* action brought by the plaintiff under § 594 of the civil code, and is one of a kind of actions which can be maintained only by a person who is in the *actual possession* of the property in controversy, either by himself or tenant. Where personal service of summons can be obtained in such an action, the action is one *in personam* as well as *in rem;* but where service of summons can be had only by publication, then the action is one only *in rem.* The present action is one only *in rem;* and the court below had ample jurisdiction to hear and determine the same. For the present, we shall assume that the statutes authorizing service of summons by publication were strictly complied with in the present case, and then the only question to be considered is whether the statutes themselves are valid; or, in other words, we think the question is this: Has the state any power through the legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the state belonging to non-resident owners out of the state, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the state, or to the courts of the state, and where the most urgent public policy and justice require that the state and its courts should assume jurisdiction over such property. Power of this kind has always been exercised, not only in Kansas, but in all the other states. Lands of non-resident owners, as well as of resident owners, are taxed and sold for the taxes; and the owners may thereby be totally deprived of such lands, although no notice is ever given to such owners except a notice by publication or some other notice of no greater value, force, or efficacy. Beebe *v.* Doster.[1] Mortgage liens, mechanics' liens, material-men's liens, and other liens are foreclosed against non-resident defendants upon service by publication only. Lands of non-resident defendants are attached and sold to pay their debts; and indeed almost any kind of action may be instituted

[1] 36 Kan. 666, 675-677.

and maintained against non-residents to the extent of any interest in property which they may have in Kansas, and the jurisdiction to hear and determine in this kind of cases may be obtained wholly and entirely by publication. Gillespie *v.* Thomas;[1] Walkenhorst *v.* Lewis;[2] Rowe *v.* Palmer;[3] Venable *v.* Dutch.[4] All the states, by proper statutes, authorize actions against non-residents, and service of summons therein by publication only, or service in some other form no better; and in the nature of things such must be done in every jurisdiction, in order that full and complete justice may be done where some of the parties are non-residents. We think a sovereign state has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and generally, within its own boundaries, a sovereignty is supreme. Kansas is supreme except so far as its powers and authority are limited by the constitution and laws of the United States. And within the constitution and laws of the United States the courts of Kansas may have all the jurisdiction over all persons and things within the state, which the constitution and laws of Kansas may give to them, and the mode of obtaining this jurisdiction may be prescribed wholly, entirely, and exclusively by the statutes of Kansas. To obtain jurisdiction of anything within the State of Kansas, the statutes of Kansas may make service by publication as good as any other kind of service. In the present case the plaintiff resides within the State of Kansas, and he virtually surrendered jurisdiction of himself to the court below when he commenced this action. He is in the actual possession of the property in controversy, and, being in the actual possession thereof, he also in effect surrendered jurisdiction thereof to the court when he brought this action, and as much jurisdiction thereof as any court in any action could obtain by virtue of a seizure of the property by its own officers; and service of summons by publication, as authorized by law, was afterward had in this case; and this gave the court the power to hear and determine the case, and to render a judgment therein, and to enforce such judgment; and this is all that is necessary to give complete and absolute jurisdiction over the thing in controversy. Jurisdiction is simply the power to hear and determine and to enforce the judgment, order, or decree made or rendered on such hearing. Nothing can be lacking in the present case. The court had the power to hear and determine the case, the power to render the judgment prayed for, which was to quiet the plaintiff's title and possession; and he was in the actual possession of the property; and as the property was and is within the territorial jurisdiction of the court, there would seem to be no good reason why the judgment is not valid, and why the court cannot enforce such judgment. It is said in the case of Hart *v.* Sansom, that "the courts of the state may perhaps feel bound to give effect to the service made as directed by its statutes;" and also: "It would doubtless be within the power of the state in which the land lies to provide by

[1] 23 Kan. 138. [2] 24 Id. 420. [3] 29 Id. 337. [4] 37 Id. 515, 519.

statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose." Now certainly no court would feel bound to give effect to a statute unless the court believed the statute to be valid and an existing law, and if the state may rightfully provide by statute that any one of its courts may authorize a trustee to make or cancel a deed executed by or for a non-resident, or in which a non-resident is interested, then the state could unquestionably authorize the same court by its judgment alone, to cancel or in effect to create the deed, for the trustee appointed by the court is the mere creature of the court and can take no power nor exercise any power except such as emanates from the court itself. There can certainly be no necessity for the circuitous, indirect, and cumbrous mode of appointing a trustee to do a thing, when the judgment of the court may itself answer the entire purpose. See Civil Code, § 400.[1] If jurisdiction cannot be given to the court to render such a judgment, then, *a fortiori*, jurisdiction could not be given to the court to appoint a trustee for such a purpose. A court without jurisdiction cannot do anything, — not even to appoint a trustee. We think the court below had ample jurisdiction in the present case. We think a court may in any case, where the statutes authorize the same, obtain jurisdiction upon service by publication concerning anything present and existing within the boundaries of the state. To hold otherwise would unsettle and overturn a great many titles to land in this state, — titles which have long been acquiesced in and supposed to be good and valid, and to be settled and established by the statutes and by numerous judicial decisions. And to hold otherwise would also do great injustice to innocent purchasers of lands who hold the same under such titles. We think such titles are good.

The judgment of the court below will be affirmed.

All the Justices concurring.[2]

[1] "When a judgment shall be rendered for a conveyance, release, or acquittance in any court of this state, and the party against whom the judgment shall be rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release, or acquittance had been executed conformably to such judgment; or the court may order such conveyance, release, or acquittance to be executed in the first instance by the sheriff; and such conveyance, release, or acquittance, so executed, shall have the same effect as if executed by the party against whom the judgment was rendered." — Ed.

[2] By similar legislation in many jurisdictions a court of equity is authorized to vest in the plaintiff without any act by the defendant, the title to domestic land which the latter ought to convey but refuses to convey.

Decree against Resident Owner of Domestic Land. — Brine *v.* Ins. Co., 96 U. S. 627 (foreclosure suit); Langdon *v.* Sherwood, 124 U. S. 74 (constructive trust); Jones *v.* Fletcher, 42 Ark. 422 (constructive trust); King *v.* Bill, 28 Conn 593 (specific performance, — as title vests only by decree; if defendant conveys to a stranger after bill filed, but before decree, the decree will not divest the stranger of his title, but plaintiff must proceed in equity against him); Young *v.* Frost, 1 Md 377 (partition suit); Gitt *v.* Watson, 18 Mo. 274 (constructive trust); Sensenderfer *v.* Kemp, 83 Mo. 581 (constructive trust); Macklin *v.* Allenberg, 100 Mo. 337 (*semble*, constructive trust); Price *v.* Sisson, 13 N. J. Eq. 168 (reformation of deed); Taylor *v.* Boyd, 3 Oh. 338; (a *bona fide* purchaser from plaintiff

after a decree in latter's favor is not affected by a subsequent reversal of the decree); Griffith *v.* Phillips, 3 Grant's Cas. 381 (partition suit).

Decree against Non-resident Owner of Domestic Land. — Service by Publication. Boswell *v.* Otis, 9 How. 336 (*semble*, specific performance); Bryan *v.* Kennett, 113 U. S. 179 (bill to remove cloud on title); Arndt *v.* Griggs, 134 U. S. 316, Beale's Cas. Confl. Laws, 268 s. c. (cloud on title); Dick *v.* Foraker, 155 U. S. 404 (cloud on title); Lynch *v.* Murphy, 161 U. S. 247, 251 (*semble*, cloud on title); Palmer *v.* McCormick, 28 Fed. R. 865 (foreclosure sale); Martin *v.* Pond, 30 Fed. R. 15 (foreclosure sale); Bennitt *v.* Fenton, 41 Fed. R. 283 (cloud on title); Porter Co. *v.* Baskin, 43 Fed. R. 323 (specific performance); Single *v.* Scott Co., 55 Fed. R. 553; Adams *v.* Heckscher, 80 Fed. R. 742, 83 Fed. R. 281 (*semble*, specific performance); Ormsby *v.* Ottman, 85 Fed. R. 492 (cloud on title); Morrison *v.* Marker, 93 Fed. R. 692 (cloud on title); Grove *v.* Grove, 93 Fed. R. 865 (foreclosure sale); Deck *v.* Whitman, 96 Fed. R. 873 (foreclosure sale); McLaughlin *v.* McCrory, 55 Ark. 442 (cloud on title); Perkins *v.* Wakehan, 86 Cal. 580; Quarl *v.* Abbott, 102 Ind. 233; Knudson *v.* Litchfield, 87 Iowa, 111 (cloud on title); Oldham *v.* Stevens, 45 Kan. 369 (cloud on title); Felch *v.* Hooper, 119 Mass. 52 (specific performance); Short *v.* Caldwell, 155 Mass. 57 (cloud on title); Corson *v.* Shoemaker, 55 Minn. 386 (reformation of deed so as to include omitted land); Scarborough *v.* Myrick, 47 Neb. 794 (cloud on title); Robinson *v.* Kind, 23 Nev. 330 (cloud on title); Mo. Co. *v.* Crane, 13 Tex. Civ. Ap. 426 (cloud on title); Matteson *v.* Schofield, 27 Wis. 671 (specific performance, actual service on non-resident who left the jurisdiction before decree).

Decree against Non-resident Owners of Foreign Land. — If the defendant as well as the *res* is beyond the jurisdiction, there is obviously no basis for any decree by a court of equity. Ames, Cases on Trusts (2d ed.) 249, n. 3. And in such a case even a statute, purporting to vest the title by decree in favor of a plaintiff, would be nugatory. Corbett *v.* Nutt, 10 Wall. 464; Daniels *v.* Stevens, 19 Oh. 222. In Wilson *v.* Martin-Wilson Co., 151 Mass. 515, title was adjudged to vest by decree, although the owner was a non-resident, and the *res* was a United States patent right. Field and W. Allen, JJ., dissented, being unable to concur with the view that the patent was a Massachusetts *res*.

Vesting of Title in a New Trustee. — However desirable it may be to have a change of trustees, equity cannot, apart from statutes, effect a transfer of the title to the trust *res* to the new trustee, unless the old trustee is willing to execute a conveyance. Hart *v.* Sansom, *supra*, 11; Ingersoll *v.* Cooper, 5 Blackf. 426; McCann *v.* Randall, 147 Mass. 81, 99; Davant *v.* Guerard, 1 Speers, 242. This doctrine is very clearly expressed by Field, J., in McCann *v.* Randall, *supra*: "Independently of statute, a court of equity cannot appoint a person to execute a transfer of the property of another. . . . Courts of law can transfer the title to property. In real actions they declare the title and transfer the possession; in personal actions, by virtue of a levy of execution, they transfer both title and possession; but decrees of courts of equity, except where statutes have made other provisions, operate only *in personam*. 'This power of creating and extinguishing titles the chancellor never had nor claimed to have, except when it was given to him by statute. It is true that he frequently directed the sale of property, but it was by his control over the person of the owner that he made the sale effective, *i. e.*, when the sale had been made he compelled the owner to execute a deed pursuant to the sale; and hence when the owner was out of the jurisdiction the chancellor was powerless.' Langdell Eq. Pl. (2d ed.) § 43, n. 4; 3 Pom. Eq. Jur. § 1317; Hart *v.* Sansom, 110 U. S. 151." But it is generally provided by statute either that the title shall vest in the new trustee immediately upon his appointment, or that a special nominee of the court of equity shall be authorized to make a conveyance to the new trustee having the same effect as a deed executed by the original trustee. Dew *v.* Clark, 4 Russ. 511 (*semble*); St. 12 & 13 Vict. c. 60, §§ 9, 10; Ager *v.* Murray, 105 U. S. 126, 132; Seculovich *v.* Morton, 101 Cal. 673; Druid Co. *v.* Oettinger, 53 Md. 46, 61; Glenn *v.* Williams, 60 Md. 93, 100; Worthington *v.* Lee, 61 Md. 530, 541; Green *v.* Borland, 4 Met. 330; Parker *v.* Converse, 5 Gray, 336; Hammond *v.* Granger, 128 Mass. 272; McCann *v.* Randall, 147 Mass. 81, 99; Wilson *v.* Martin-Wilson Co., 151 Mass. 515, 517, 522; Wilson *v.* Welch, 157 Mass. 77, 80; Warren *v.* Howard, 99 N. C. 190, 194; McNish *v.* Guerard, 4 Strob. Eq. 66, 79, 80; Wooldridge *v.* Planters Bank, 1 Sneed, 297; Belote *v.* White, 2 Head, 703. — Ed.

65 N. J. Eq. 730.

5

E. B. MERRILL and Another, Executors, *v.* L. F. BECKWITH.

Supreme Judicial Court, Massachusetts, May 24, 1895.

[163 *Massachusetts Reports*, 503.]

Lathrop, J. This is a bill in equity for the specific performance of an alleged contract for the purchase of a parcel of land in this Commonwealth. The defendant, in 1889, leased of the plaintiffs the island Nashawena in Buzzard's Bay, by an indenture containing a covenant that, if during the term the defendant should be minded to purchase the premises for sixty-five thousand dollars, payable fifteen thousand dollars in cash and the rest by his bond secured by mortgage as therein specified, and should pay or tender the fifteen thousand dollars to the plaintiffs with intent to purchase, then the plaintiffs, in consideration of that sum with the bond and mortgage so tendered, would convey the premises. This lease was renewed, together with the option of purchase, on May 1, 1892, for two years.

On September 10, 1893, the defendant wrote to one of the plaintiffs a letter containing the following: "I have concluded to avail myself of my option to purchase the island Nashawena, and as soon as my lawyers have examined titles and make abstracts I shall be ready to carry it out."

The defendant is a citizen and resident of New York, and there has been no sufficient service upon him in this Commonwealth. Service has been made by publication, and by delivery of a copy to the committee of the property of the defendant in New York, where he had been adjudged to be a lunatic.

It is obvious that no personal decree can be rendered against the defendant. In Spurr *v.* Scoville,[1] it was held that a person who had agreed to purchase land in this Commonwealth could not maintain a bill in equity against the person who had agreed to sell it for specific performance, where the defendant resided out of the Commonwealth and had not been served with process here. This was put on the ground that, the suit being *in personam*, there was no party defendant before the court, and the court was unable to proceed to any decree.

The plaintiffs, however, contend that the case at bar falls within the purview of the Pub. Sts. c. 141, § 22. This statute was first passed in 1845, and was reënacted in the General Statutes. St. 1845, c. 64. Gen. Sts. c. 100, § 15. It was in force when Spurr *v.* Scoville, above cited, was decided, but was not referred to by the court. The language of the statute as it now stands is as follows: "When a person seised or possessed of real or personal estate, or of an interest therein, upon a trust, express or implied, is under the age of twenty-one years, insane, out of the Commonwealth, or not amenable to the process of any court therein which has equity powers, and when in

[1] 3 Cush. 578.

the opinion of the Supreme Judicial Court or of a probate court it is fit that a sale should be made of such estate or of an interest therein, or that a conveyance or transfer should be made thereof in order to carry into effect the objects of the trust, the court may by decree direct such sale, conveyance, or transfer to be made, and may appoint some suitable person in the place of such trustee to sell, convey, or transfer the same in such manner as it may require. If a person so seised or possessed of an estate, or entitled thereto upon a trust, is within the jurisdiction of the court, he or his guardian may be ordered to make such conveyances as the court may deem proper."

The case of Felch *v.* Hooper [1] was similar to that of Spurr *v.* Scoville, with these additional facts. The plaintiff had paid or tendered the consideration, and had by the defendant's permission entered upon the land and made improvements thereon. Under these circumstances it was held that he had an equitable title to the land which he could enforce by a conveyance made by a trustee appointed by the court, under the Gen. Sts. c. 100, § 15.

In Desper *v.* Continental Water Meter Co.,[2] it was held that this court had no jurisdiction of a bill in equity by a citizen of this Commonwealth against a foreign corporation having a usual place of business here for specific performance of an agreement to assign and convey letters patent of the United States, and personal chattels situated here, where there was no valid service upon the corporation; and it was said by Mr. Justice Field, in delivering the opinion of the court, "We are of opinion that this case is not within the purview of the Pub. Sts. c. 141, § 22."

The distinction between these cases seems to be that where the relation between the parties is simply that of contract, namely, where one agrees to sell and the other to buy, there is correctly speaking no trust created, but merely "a contract of sale and purchase of which a court of equity will under certain circumstances decree a specific performance." But where the person agreeing to purchase has been allowed by the owner to enter upon the land and make improvements, there is a trust created in his favor. See Rayner *v.* Preston; [3] *In re* Cuming; [4] *In re* Colling.[5]

However this may be, we are of opinion that the statute is not applicable to a person who has agreed to purchase; and that the court has no power under it to compel him to accept a conveyance, where the court cannot bind him personally by its decree. *Bill dismissed.*[6]

[1] 119 Mass. 52. [2] 137 Mass. 252. [3] 18 Ch. D. 1, 6, 10, 11, 13.
[4] L. R. 5 Ch. 72. [5] 32 Ch. D. 333, 336.
[6] Adams *v.* Heckscher, 80 Fed. R. 742; 83 Fed. R. 281 *Accord.*
To the same effect see Cloyd *v.* Trotter, 118 Ill. 318 (decree for payment of costs).
No contempt on service by publication.—If equity does not acquire jurisdiction of the person of the defendant, he is not guilty of contempt in disobeying a decree against him, even though the res is within the jurisdiction. State *v.* Nattan, 49 S. C. 199, 225. Nor can equity properly grant an injunction restraining one, not personally served, from doing any act beyond the jurisdiction. Worthington *v.* Lee, 61 Md. 531, 543. — Ed.

SIR GEORGE CARTERET *v.* SIR WILLIAM PETTY.

IN CHANCERY, BEFORE LORD NOTTINGHAM, C., FEBRUARY 21, 1675.

[2 *Swanston*, 323, *note* (*a*).]

THE bill set forth that the defendant had bargained and sold to the plaintiff a moiety of certain lands in Ireland, and that he did there cut down the woods, and commit other waste, and so prayed an account and a partition: the defendant demurred, because the freehold and inheritance of lands in Ireland ought not to be settled here. I ordered him to answer as to the account, but allowed the demurrer as to the partition; for wheresoever the defendant may, by personal coercion, be compelled to perform the act decreed, there after answer put in, the court shall proceed to a decree though the defendant be in Ireland, and rely upon the justice of the King to compel him to be sent for over, to yield obedience, as was done in Alderman Preston's case of Dublin, and advised to be done by the council table, in the Earl of Thomond's case; for, otherwise, there must be a failure of justice; because, in Ireland they are not bound to execute the decrees of England, upon a bill there preferred to have such execution, as was lately resolved in Ireland, and very justly, in the case of one Savage, and since in the case of the Earl of Thomond.[1] And so it was resolved long since at the common law, that if a man be outlawed in England, and flee into Ireland, no *capias utlagatum* can follow him thither; of which see some ancient records in my manuscripts of Mr. Noy's collection, fol. . . . And if it be said the plaintiff may go over into Ireland and exhibit a new original bill against the man there, it is equal to a failure of justice; for by that time the case is well advanced there, the man may flee again out of Ireland, into England or Scotland, so that there can never be any certain justice, but in the absolute power of the King, which can bring all his subjects into the proper place where they ought to render reason. But all this is to be understood of such cases where the imprisonment of the person is the most proper means to effect that which is decreed to be done, viz., the payment of money, making a conveyance, or the like. But where no obedience of the person imprisoned, or any act of his, can sufficiently execute such a decree, there it is in vain to hold such a plea; and that is this case: For, to a partition in Chancery it is necessary to award

1 Bullock *v.* Bullock, 52 N. J. Eq. 561 (New York decree against husband in a divorce suit for conveyance of certain land in New Jersey as security for alimony). Burnley *v.* Stevenson, 24 Oh. St. 474 *Accord*.

If, however, a decree in one state for the conveyance of land in another is based upon a contract or trust held to be binding upon the defendant, such decree under the provision of the Federal constitution that full faith and credit be given in each state to the records and judicial proceedings of every other state, is conclusive evidence of the obligation of the contract or trust in a proceeding to enforce the contract or trust in the state where the land is situated. Dunlop *v.* Byers, 110 Mich. 109; Dobson *v.* Pearce, 12 N. Y. 156; Burnley *v.* Stevenson, 24 Oh. St. 474. — ED.

a commission to some neighboring justices to divide the lands; if they refuse, there lies an attachment against them for such refusal; if they execute the commission and return it, then there ought to be a decree, that the lands be accordingly conveyed, and that, till a conveyance, they may be so enjoyed; the consequence thereof is a sequestration, and an injunction for the possession, and a writ of assistance to the sheriff: none of all which can be awarded into Ireland, nor supplied by the obedience of the person imprisoned here. So far the demurrer is good.[1]

TOLLER *v.* CARTERET.

In Chancery, before Lord Cowper, K., May 14, 1705.

[2 *Vernon*, 494.]

Sir Philip Carteret, owner of the island of Sarke, made a mortgage thereof to one Willowe, the plaintiff's intestate, for five hundred years for £500.

The bill was that the defendant might redeem, or be foreclosed.

The defendant pleaded to the jurisdiction of the court, that the island of Sarke was part of the Duchy of Normandy, and had laws of their own, and were under the jurisdiction of the courts of Guernsey, and not within the jurisdiction of the Court of Chancery; and cited 4 Inst. 284; Anderson's 2 Rep. 115; Kelloway, 202.

Lord Keeper overruled the plea, because the grant was of the whole island; and secondly, that the Court of Chancery had also a jurisdiction, the defendant being served with the process here, *et æquitas agit in personam*, which is another answer to the objection.[2]

[1] White *v.* White, 7 Gill & J. 208; Wimer *v.* Wimer, 82 Va. 890; Pillow *v.* S. W. Co., 92 Va. 144 *Accord*.

In the following cases, also, equity declined to give relief in regard to a foreign res. Roberdean *v.* Rous, 1 Atk. 543 (investing plaintiff with possession of foreign res); Wynne *v.* Hughes, 26 Beav. 374 (appointment of receiver and order of sale under control of the court); Cookney *v.* Anderson, 31 Beav. 452 (winding up of a Scotch trust — but on appeal case was decided on another ground); Blake *v.* Blake, 18 W. R. 944 (winding up of a foreign trust); Matthaei *v.* Galitzin, 18 Eq. 340 (winding up of a foreign trust); Poindexter *v.* Burwell, 82 Va. 507 (explaining Barger *v.* Buckland, 28 Grat. 850 — sale of foreign res — see Gibson *v.* Burgess, 82 Va. 650). — Ed.

[2] Paget *v.* Ede, 18 Eq. 118; *Re* Longdale Co., 8 Ch. D. 150; Mead *v.* N. Y. Co., 45 Conn. 199; Eaton *v.* McCall, 26 Me. 350 (*semble*) *Accord*.

In Eaton *v.* McCall, cited in the preceding paragraph, Wiswell, J. said, p. 350: "We do not think that a chancery court should exercise this power except under unusual or extraordinary circumstances. Wherever it is necessary in order to prevent loss or to protect the rights of a mortgagee, it may be done; for instance, in the case of a mortgage upon property situated both within and without the State, where unless a sale of the entire property could be made at one time great loss might ensue, or in other cases where an equally good reason existed. But ordinarily we think that the holder of a mortgage should be required to resort to the remedies or the courts of the jurisdiction in which the land is situated." The Maine court accordingly declined to decree a foreclosure of a Nova Scotia mortgage. — Ed.

THE UNION TRUST COMPANY *v.* W. H. OLMSTED AND OTHERS.

COURT OF APPEALS, NEW YORK, JUNE 15, 1886.

[102 *New York Reports*, 729.]

THIS was an action to foreclose a mortgage executed by defendant, The Buffalo, Rochester and Pittsburgh Railroad Company, upon its road, a part of which is in the State of Pennsylvania. Judgment of foreclosure and sale in the ordinary form was rendered, and the mortgaged property was sold under it. In connection with motion to confirm report of sale, motion was made to amend the judgment by inserting therein a provision requiring the mortgagor to execute to the purchaser a deed of the mortgaged property. This motion to amend was denied at Special Term, but its order was reversed on appeal and motion granted by the General Term.

The following is the *mem.* of opinion: —

"The plaintiffs sought by foreclosure and sale to enforce a mortgage executed by the defendant corporation. The Supreme Court had jurisdiction over the cause of action and the parties, and its decree is valid although part of the premises covered by it are in another State. Its writ may not be operative there, nor its judgment capable of execution as against that portion of the property, and for that reason the court might have required the mortgagor to execute a conveyance to the purchaser in order that the whole security offered by the mortgage should so far as possible be made effective. Muller *v.* Dows.[1] This was not done, but the power of the court was not exhausted, and what it might have ordered in the first instance, it could still require by amendment. The order appealed from goes no further than to carry out the intention of the parties to the mortgage, as ascertained by the decree — it relates to a matter within the jurisdiction of the court, and its exercise is not the subject of review.

"The appeal should, therefore, be dismissed."[2]

1 94 U. S. 444, 450.

2 Muller *v.* Dows, 94 U. S. 444; Lyman *v.* Lyman, 2 Paine, 11; Wilmer *v.* Woods, 2 Woods, 447 (*semble*); Croft *v.* Indiana Co., 166 Ill. 580; Eaton *v.* McCall, 86 Me. 346, 350; Dunlap *v.* Byers, 110 Mich. 109; Wood *v.* Warner, 15 N. J. Eq. 81; Harrison *v.* Union Co., 144 N. Y. 326; McElrath *v.* Pittsburg Co., 55 Pa. 189; Miller *v.* Birdsong, 7 Baxt. 531 *Accord*. — ED.

LORD PORTARLINGTON *v.* SOULBY.

IN CHANCERY, BEFORE LORD BROUGHAM, APRIL 15, 1834.

[3 *Mylne & Keen*, 104.]

THE LORD CHANCELLOR.[1]

This was a motion to dissolve an injunction, granted to restrain the defendants from suing in Ireland upon a bill of exchange for £1000, accepted by the plaintiff, payable to a person of the name of Aldridge, by whom it was indorsed and passed away to Mr. Brook, a retail dealer in wines, and by him to the defendants.

The ground of the injunction is, that the bill was given by Lord Portarlington for money lost at play.

The case is reduced to this. An illegal consideration distinctly stated and not denied, with several circumstances leading to the belief, that the defendants now know such to have been the origin of the bill; and several circumstances also shewing that it was taken by their late partner under suspicion, and yet without inquiry.

It is, then, impossible to doubt that the injunction was well granted, and the whole question would be free from difficulty but for one peculiarity in the case; the action is brought in Ireland, and the interposition of this court is sought to stop proceedings there. That this is an unusual proceeding must be admitted, but I do not see any ground for questioning the competency of it.

Soon after the restoration, and when this like every other branch of the court's jurisdiction was, if not in its infancy, at least far from that maturity which it attained under the illustrious series of chancellors, the Nottinghams and Macclesfields, the parents of equity, the point received a good deal of consideration in a case which came before Lord Clarendon, and which is reported shortly in Freeman's Reports, and somewhat more fully in Chancery Cases, under the name of Love *v.* Baker.[2] In Love *v.* Baker it appears that one only of several parties who had begun proceedings in the court of Leghorn was resident within the jurisdiction here, and the court allowed the *subpœna* to be served on him, and that this should be good service on the rest. So far there seems to have been very little scruple in extending the jurisdiction. Lord Clarendon refused the injunction to restrain those proceedings at Leghorn, after advising with the other judges; but the report adds, "*sed quære*, for all the bar was of another opinion," and it is said that, when the argument against issuing it was used, that this court had no authority to bind a foreign court, the answer was given that the injunction was not directed to the foreign court, but to the party within the jurisdiction here. A very sound answer, as it appears to me; for the same argument might

[1] A part of the judgment relating to the bad faith of the defendants is omitted. — ED.

[2] 2 Freem. 125. 1 Ch. Ca. 67.

apply to a court within this country, which no order of this court ever affects to bind, our orders being only pointed at the parties to restrain them from proceeding.

Accordingly this case of Love *v.* Baker has not been recognized or followed in later times. Two instances are mentioned in Mr. Hargrave's collection of the jurisdiction being recognized; and in the case of Wharton *v.* May,[1] which underwent so much discussion, part of the decree was to restrain the defendants from entering up any judgment, or carrying on any action, in what is called "the Court of Great Session in Scotland," meaning, of course, the Court of Session.

I have directed a search to be made for precedents in case the jurisdiction had been exercised in any instances which have not been reported; and one has been found directly in point. It is the case of Campbell *v.* Houlditch in 1820, where Lord Eldon ordered an injunction to restrain the defendant from further proceeding in an action which he had commenced before the court of session in Scotland. From the note which his lordship himself wrote upon the petition, requiring a further affidavit, and from his refusing the injunction to the extent prayed, it is clear that he paid particular attention to it. This precedent, therefore, is of very high authority.

In truth, nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if, for instance, as in Penn *v.* Lord Baltimore,[2] it can decree the performance of an agreement touching the boundary of a province in North America; or, as in the case of Toller *v.* Carteret, can foreclose a mortgage in the isle of Sark, one of the channel islands; in precisely the like manner it can restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act in *pais*, or the instituting or prosecution of an action in a foreign court.

It is upon these grounds, I must add, and these precedents, that I choose to rest the jurisdiction, and not upon certain others of a very doubtful nature, such as the power assumed in the year 1682, in Arglasse *v.* Muschamp,[3] and again by Lord Macclesfield in the year 1724 in Fryer *v.* Bernard,[4] of granting a sequestration against the estates of a defendant situated in Ireland. The reasons given by that great judge in the latter case plainly shew that he went upon a ground which would now be untenable, viz., what he terms the superintendent power of the courts in this country over those in Ireland; and indeed he supports his order by expressly referring to the right then claimed by the King's Bench in England to reverse the judgments of the King's Bench in Ireland. This pretension, however,

[1] 5 Ves. 71. [2] 1 Ves. sen. 444. [3] 1 Vern. 75. [4] 2 P. Wms. 261.

has long ago been abandoned, and has indeed been discontinued by parliamentary interposition; and the power of enforcing in Ireland judgments pronounced here, and *vice versa*, is at the present time the subject of legislative consideration.

As to the argument that the courts of equity in Ireland can, if applied to, restrain the action, the same consideration would prevent an injunction from ever issuing to stay proceedings in this country; for it might be said that the Court of Exchequer has the power of restraining, and therefore there needs no interposition of the Court of Chancery. It suffices to say that the court in which the action is brought is a court of common law, and has no jurisdiction as such to stop the proceeding upon the ground now set forth.

I am, therefore, of opinion that this injunction was well issued, and that it must be continued, and that this motion must be refused with costs.[1]

HELEN A. KEMPSON *v.* ST. GEORGE KEMPSON.

IN CHANCERY, NEW JERSEY, BEFORE PITNEY, V. C., APRIL 26, 1899.

[58 *New Jersey Equity Reports*, 94.]

ON order to show cause why injunction should not issue.

Mr. Charles C. Hommann, for the complainant.

PITNEY, V. C. The complainant, the wife, exhibits her bill against the defendant, her husband, and by it asks the exercise of the restraining power of the court to enjoin him from further proceeding with a suit which he has commenced against her in one of the courts of the State of North Dakota for a divorce from the bonds of matrimony on the ground of misconduct on her part other than that of adultery, viz., cruelty. Suit was commenced by the husband in that court on March 29th, 1899, and service of the complaint and summons was made upon her April 4th, 1899, in this State, where her domicile is, and where, also, that of the husband was up to at least the 23d of December last. The complaint asks for the custody of the children of the marriage.

In his complaint he alleges that he is and has been for three months a resident of the State of North Dakota. The allegation of the bill is

[1] An injunction against an action without the jurisdiction was issued in the following cases, in which, as in the principal case, the plaintiff's claim was wholly invalid: Wharton *v.* May, 5 Ves. 26, 71; Bushby *v.* Munday, 5 Mad. 297 (criticized in Maclaren *v.* Stainton, 26 L. J. Ch. 332, 334); Gage *v.* Riverside Co., 86 Fed. R. 984; Engel *v.* Scheuerman, 40 Ga. 206; Sandage *v.* Studabaker Co., 142 Ind. 148; Home Co. *v.* Howell, 24 N. J. Eq. 238.

But in Jones *v.* Geddes, 1 Ph. 724, the court declined to restrain, at the suit of the assignees of an English bankrupt, English holders of a fraudulent Scotch heritable bond from enforcing it in Scotland. The balance of convenience was thought to be against the injunction.

Equity will also restrain the execution of a foreign judgment procured fraudulently. Stevens *v.* Central Bank, 144 N. Y. 50; Davis *v.* Cornue, 162 N. Y. 172, 151 N. Y. 176; Gray *v.* Richmond Co. (New York 1901), 60 N. E. R. 663. — ED.

that this statement in the Dakota complaint is false, and that the husband is about to practise a fraud upon the court of that State and also upon the complainant, and makes that threatened fraud the basis of her right to relief in this court.

The affidavits annexed to the bill make out a strong *prima facie* case for the complainant, much stronger than was made for the complainant upon the hearing of the case of Streitwolf *v.* Streitwolf.[1]

The action of the chancellor in that cause before it came on for final hearing is a precedent for the power of the court to intervene in such a case. The chancellor there, at the instance of the wife, granted an injunction against Streitwolf's further proceeding with his suit in North Dakota, which injunction was disregarded. The difference between that case and this, however, is manifest. There the wife had already brought a suit in this court against her husband for divorce from bed and board on the ground of his extreme cruelty, and he had answered, setting up the very matters in defence which he subsequently made the foundation of his suit in Dakota.

In the case in hand the complainant's right to relief rests solely upon the ground that the conduct of her husband while domiciled in New Jersey in going to Dakota and gaining a nominal or pretended residence there for a few months and commencing a suit against her there based on such pretended residence is so far inequitable and unjust as to merit the interference of a court of equity.

I am of the opinion, upon the case made by the bill and affidavits, that complainant is entitled to the aid of this court. She is in this predicament — she must either (1) go to the trouble and expense of appearing generally in the Dakota court to resist her husband's claim, or (2) she must attempt to appear specially for the purpose of contesting the jurisdiction of the court by showing his real domicile to be in New Jersey. Either of these defences involves great labor and expense on her part. The only other course open to her is, in substance, to allow judgment by default to go against her there, and attack the decree when attempted to be enforced in this State. Now, if she adopts the first remedy and appears in that court, it will, by that appearance, have obtained jurisdiction of her person and undoubted jurisdiction of the subject-matter of the suit, and the case then will be brought within the authority of the case of Fairchild *v.* Fairchild,[2] and the decree of that court will be binding upon her. As to the second course, namely, a special appearance for the purpose of attacking the jurisdiction, it is common knowledge that the courts of Dakota assume jurisdiction of non-resident defendants based on a residence on the part of the plaintiff which falls far short of amounting to an actual domicile. In fact, they are satisfied with a mere temporary residence adopted for the purpose of obtaining a divorce, and without any *animus manendi;* so that, if she should appear specially, the task of satisfying the court that her husband was not a *bona fide* domiciled resident of the State would be well-nigh hopeless. If she takes the

[1] 41 Atl. Rep. 876.

[2] 8 Dick. Ch. Rep. 678.

remaining course, and fails entirely to appear, and allows a decree to go against her, she will be in the situation of a divorced wife, who must bring a suit to set aside the decree of divorce and enforce her rights against her husband, who may avoid a personal service in this jurisdiction. This is a hardship to which it seems to me the husband has no right in equity to subject her.

I held in Felt *v.* Felt,[1] that the only ground upon which a valid decree of divorce, based upon a service out of the territorial limits of the jurisdiction of the court, could be rested, was that the complaining spouse had an actual *bona fide* domicile within that jurisdiction. It will be no hardship for the defendant herein to have the question of his actual domicile in Dakota settled by judicial investigation here before he proceeds with his suit there, and it seems to me that the ends of justice will be best attained by such preliminary determination. The rights and interests of the children will also be better protected by such a determination.

I will advise an order that an injunction do issue pending this suit.[2]

1 12 Dick. Ch. Rep. 101.

2 The husband, in defiance of the injunction, proceeded with his suit in North Dakota and obtained a decree of divorce. The New Jersey court, at the suit of the wife, thereupon decreed that he be fined five dollars and costs of the proceedings, and that he be committed to prison until the fine and costs were paid and until he should take proper and efficient methods to open and set aside the decree obtained in North Dakota.

The principal case and the preceding one, Portarlington *v.* Soulby, illustrate the inherent power of equity to restrain a person within its jurisdiction from taking legal proceedings without the jurisdiction. Whether this power should be exercised in a particular case is determined by considerations of fitness and expediency.

Concurrent Litigation. — If, for instance, legal proceedings have already begun or must begin in the domestic forum, equity, to prevent concurrent litigation as to the same matter, will generally restrain the institution or continuance of foreign proceedings. Pieters *v.* Brown, Coop. 294 (*semble*); Harrison *v.* Gurney, 2 J. & W. 563; Beckford *v.* Kemble, 1 S. & S. 7; Beauchamp *v.* Huntley, Jac. 546; Wedderburn *v.* Wedderburn, 4 M. & C. 585; Bunbury *v.* Bunbury, 1 Beav. 318; Graham *v.* Maxwell, 1 Macn. & G. 71; Hope *v.* Carnegie, 1 Ch Ap. 320; Baillie *v.* Baillie, 5 Eq. 175; French *v.* Hay, 22 Wall. 250; Pickett *v.* Ferguson, 45 Ark. 177; Sercomb *v.* Catlin, 128 Ill. 557; Field *v.* Holbrook, 3 Abb. Pr. 377; Kittle *v.* Kittle, 8 Daly, 72; Chafee *v.* Quidneck Co., 13 R. I. 442; Vermont Co. *v.* Vermont Co., 46 Vt. 792.

But Equity is reluctant to restrain foreigners from suing abroad, and accordingly declined to act in Carron Co. *v.* Maclaren, 5 H. L. C. 416; *In re* Chapman, 15 Eq. 75; Moor *v.* Anglo-Italian Bank, 10 Ch. D. 681; *Re* Boyse, 15 Ch. D. 591; Reynolds *v.* Adden, 136 U. S. 348.

Foreign proceedings in evasion of domestic legislation. — Equity will restrain a domestic creditor from reaching property of an insolvent debtor situated without the jurisdiction, which the insolvent law requires the debtor to convey to his assignee in insolvency. Mackintosh *v.* Ogilvie, 3 Sw. 365, 4 T. R. 193 n., s. c.; *In re* Diston, 24 L. T. Rep. 197; Cole *v.* Cunningham, 133 U. S. 107; Reynolds *v.* Adden, 136 U. S. 348, 353 (no injunction against foreign creditors); Combs *v.* Union Co., 146 Ind. 688, 691; Hayden *v.* Yale, 45 La. An. 362; Dehon *v.* Foster, 4 All. 545, 7 All. 57; Cunningham *v.* Foster, 142 Mass. 47 (*semble*); Proctor *v.* Nat. Bank, 152 Mass. 147 (*semble*).

Similarly Equity will restrain a citizen from criminally evading the state exemption laws. Wilson *v.* Joseph, 107 Ind. 490; Teager *v.* Landsby, 69 Iowa, 725; Hager *v.* Adams, 70 Iowa, 746; Zimmerman *v.* Franke, 34 Kan. 650; Keyser *v.* Rice, 47 Md. 203; Kelly *v.* Siefert, 71 Mo. Ap. 143; Snook *v.* Snetzer, 25 Oh. St 516.

Miscellaneous Instances. — *Ex parte* Tait, 13 Eq. 361 (to restrain foreign suit by a creditor whose claim under an inspectorship deed had been rejected); Vaile *v.* Knapp, 49 Barb. 299 (to restrain a citizen of New York from allowing the use of his name in a proceeding to sell chattel property on which the plaintiff held a mortgage); Claflin *v.* Hamlin, 62 How.

R. COPE *v.* THE DISTRICT FAIR ASSOCIATION.

SUPREME COURT, ILLINOIS, JUNE 21, 1881.

[99 *Illinois Reports*, 489.]

MR. JUSTICE MULKEY delivered the opinion of the court.[1]

The question presented for our determination by the record in this case is, will an injunction lie at the suit of a stockholder in an incorporated fair association, restraining the company and its officers from permitting, for a pecuniary reward, gamblers to congregate and ply their vocation upon the grounds of the company, during its annual exhibitions, where it does not appear, from the bill or otherwise, that the complainant or the company has thereby sustained some pecuniary injury or loss.

The Circuit Court of Clay county and the Appellate Court for the Fourth District have both answered this question in the negative, and, we think, properly.

It is no part of the mission of equity to administer the criminal law of the State or to enforce the principles of religion and morality, except so far as it may be incidental to the enforcement of property rights, and perhaps other matters of equitable cognizance. High on Inj., sec. 23.

The licensing of gambling tables by the officers of the company can

Pr. 284 (injunction in New York against a vexatious suit in Illinois); Dinsmore *v.* Neresheimer, 32 Hun, 204 (to prevent a bailor from suing carrier in District of Columbia where the measure of damages would be much larger than in New York, — but in Carson *v.* Dunham, 149 Mass. 52, the fact that the foreign court might take a different view of the law from that of the domestic court was considered an insufficient reason for an injunction. See also Edgell *v.* Clark, 19 N. Y. Ap. Div. 199); Dainess *v.* Allen, 3 Abb. Pr. N. S. 212 (to restrain action before American consul in Egypt, who had no jurisdiction of the case).

In the following cases the court deemed it inexpedient to issue an injunction against legal proceedings beyond the jurisdiction: Love *v.* Baker, 1 Ch. Cas. 67; Kennedy *v.* Cassilis, 2 Sw. 313; Pennell *v.* Roy, 3 D. M. & G. 126; Harris *v.* Pullman, 84 Ill. 20; Cole *v.* Young, 24 Kan. 435; Commercial Works *v.* Lambert, 49 La. An. 459; Carroll *v.* Farmers Bank, Harringt. (Mich.) 197; Mead *v.* Merritt, 2 Paige, 402; Burgess *v.* Smith, 2 Barb. Ch. 276; Williams *v.* Ayrault, 31 Barb. 364; Bellows Falls Bank *v.* Rutland Co., 28 Vt. 470.

INJUNCTION AGAINST FOREIGN TORTS. — Equity will restrain a defendant from the commission of a tort beyond the jurisdiction. Alexander *v.* Tolleston Club, 110 Ill. 65 (disturbance of a way); Frank *v.* Peyton, 82 Ky. 150 (fraudulent conveyance); Great Falls *v.* Wooster, 23 N. H. 462 (nuisance).

But see *contra*, Northern Co. *v.* Mich. Co., 15 How. 233 (*semble*) (disturbance of a franchise); Mississippi Co. *v.* Ward, 2 Black, 485 (nuisance); Atlantic Co. *v.* Baltimore Co., 46 N. Y. Supr. Ct. 377 (use of plaintiff's wires).

Similarly a court of equity of one county may restrain a defendant from committing a tort in another county of the same State. Jennings *v.* Beale, 158 Pa. 283; Munson *v.* Tryon, 6 Phila. 395.

But Equity will not issue a so-called mandatory injunction requiring a defendant to make specific reparation in another jurisdiction for a tort. People *v.* Central Co., 42 N. Y. 883 (abatement of nuisance); Morris *v.* Remington, 1 Pars. Eq. 381 (abatement of nuisance). Nor will such an injunction be issued by a county court requiring the defendant to act in another county. Munson *v.* Tryon, 6 Phila. 395, 397. — ED.

[1] Only the opinion of the court is given. — ED

not, in any sense, be regarded the act of the company. It is foreign to the objects and purposes of the association, and is clearly *ultra vires*, and the officers alone are responsible unless authorized by the stockholders, in which case it would doubtless be such an abuse of the company's franchises as would warrant the State in reclaiming them. Gambling — such as that complained of — is a violation of the criminal code, which affords ample means for its suppression.

If the bill in this case showed any pecuniary loss or injury, it would present an entirely different question; but nothing of that kind is claimed or pretended, and we are aware of no principle upon which such a bill can be maintained, and counsel has failed to suggest any or furnish us with any precedent where such a bill has been sustained.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.[1]

[1] Soltau *v.* De Held, 2 Sim. N. S. 133, 153, 154; Emperor *v.* Day, 3 D. F. & J. 217, 253; *In re* Sawyer, 124 U. S. 200, 210; World's Exposition *v.* U. S., 56 Fed. R. 654, 667 (violation of Sunday law); McKloskey *v.* Kreling, 76 Cal. 511 (violation of building ordinance); People *v.* District Court, 26 Colo. 386 (gambling-rooms); O'Brien *v.* Harris, 105 Ga. 732 (liquor selling); People *v.* Chicago Ass'n, 28 Chic. L. N. 1 (Circ. Ct., Cook Co., Ill. — gambling); Rochester *v.* Walters (Ind. Ap. 1901), 60 N. E. R. 1101 (violation of building ordinance); State *v.* Crawford, 28 Kan. 726 (liquor selling); Neaf *v.* Palmer, 103 Ky. 496 (bawdy house); Atty.-Gen. *v.* Tudor Co., 104 Mass. 239; St. Johns *v.* McFarlan, 33 Mich. 72 (violation of building ordinance); State *v.* Schweickhardt, 99 Mo. 496 (liquor selling); State *v.* Uhrig, 14 Mo. Ap. 413 (liquor selling); Warren *v.* Cavanagh, 33 Mo. Ap. 102 (illegal opening of quarry); Rice *v.* Jefferson, 50 Mo. Ap. 464 (violation of building ordinance); Mayor *v.* Smyth, 64 N. H. 380 (violation of building ordinance); Ocean Ass'n *v.* Schurck, 57 N. J. Eq. 268 (violation of Sunday law); Atty.-Gen. *v.* Utica Co., 2 Johns. Ch. 371 (violation of banking law); Mayor *v.* Thorne, 7 Paige, 261 (violation of building ordinance); Smith *v.* Lockwood, 13 Barb. 209 (illegal employment of convicts); Stilwell *v.* Buffalo Academy, 4 N. Y. Sup. 414 (violation of building ordinance); Anderson *v.* Doty, 33 Hun, 160 (bawdy house); Young *v.* Scheu, 56 Hun, 307 (violation of building ordinance); Fisher *v.* Hotel Co., 7 Oh. Dec. 67 (violation of Sunday law); Sparhawk *v.* Union Co., 54 Pa. 401 (violation of Sunday law); Phila. *v.* Lyster, 3 Pa. Super. Ct. R. 475 (violation of garbage ordinance); Williamsport *v.* McFadden, 15 W. N. C. (Pa.) 269 (violation of building ordinance); Honesdale *v.* Weaver, 2 Pa. Dist. Ct. R. 344 (violation of building ordinance); Ellwood City *v.* Mani, 16 Pa. Co. Ct. R. 474 (violation of building ordinance); Campbell *v.* Scholfield, 3 Pittsb. 445 (liquor selling); State *v.* Patterson, 14 Tex. Civ. Ap. 465 (gambling); Manor Casino *v.* State, 34 S. W. R. 769 (Tex. Civ. Ap. 1896 — liquor selling); Waupun *v.* Moore, 34 Wis. 450 (violation of building ordinance); Tiede *v.* Schneidt, 99 Wis. 201 (illegal slaughter-house) *Accord*.

The cases cited in the preceding paragraph show clearly that the doctrine of the principal case applies as well to injunction proceedings begun by the State as to suits by an individual, and to violations of municipal ordinances no less than to violations of general laws.

An act, which, though causing damage to a particular person, is at common law lawful, may by force of a statute or municipal ordinance become tortious, in which case the party damnified may have an action at law or an injunction in equity against the wrongdoer. Griswold *v.* Brega, 160 Ill. 490; First Bank *v.* Sarlls, 129 Ind. 201; Kaufman *v.* Stein, 138 Ind. 49; Rochester *v.* Walters, (Ind. Ap. 1901) 60 N. E. R. 1101); Aldrich *v.* Howard, 7 R. I. 199 (compare Grant *v.* Slater Co., 14 R. I. 380). Henry *v.* Trustees, 48 Oh. St. 671, must, if correctly decided, rest upon this principle. — Ed.

LITTLETON *v.* FRITZ.

SUPREME COURT, IOWA, MARCH TERM, 1885.

[65 *Iowa Reports*, 488.]

THIS is an action in equity, by which the plaintiff, a citizen of Polk County, seeks to enjoin and abate a nuisance, which it is alleged the defendant keeps and maintains in a certain building in the city of Des Moines, by selling intoxicating liquors therein contrary to the law. A temporary injunction was granted. The defendant appealed.

ROTHROCK, J.[1] — I. The plaintiff does not aver in his petition that he has sustained, or will sustain, any damage or injury by the maintenance of the alleged nuisance, for which he can be compensated in a money judgment.

The case, therefore, turns upon the question whether any citizen of the county, where a nuisance of this character is kept, may maintain an action in equity to enjoin and abate it.

By chapter 143 of the Laws of the Twentieth General Assembly, the statute upon this subject was amended. It was made more sweeping in its provisions, by prohibiting the sale of all kinds of intoxicating liquors, under heavy penalties, excepting sales for certain purposes by permit from the Board of Supervisors of the county. After providing for punishment for specific sales, the act, in its twelfth section, provides that, for violation of the law by unlawful sales, "the building or erection, of whatever kind, or the ground itself, in or upon which such unlawful manufacture or sale, or keeping with intent to sell, use, or give away, of any intoxicating liquor is carried on, or continued, or exists, and the furniture, fixtures, vessels, and contents, is hereby declared a nuisance, and shall be abated as hereinafter provided; and whoever shall erect or establish or continue or use any building or erection for any of the purposes prohibited in said section (the section of the law prohibiting sales) shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly, and upon conviction shall pay a fine of not exceeding $1000, and costs of prosecution. . . . Any citizen of the county where such nuisance exists, or is kept or maintained, may maintain an action in equity to abate and perpetually enjoin the same, and any person violating the terms of any injunction granted in such proceedings shall be punished as for contempt by a fine of not less than $500, nor more than $1000, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, in the discretion of the court."

The statute plainly authorizes any citizen of the county to maintain the action, and there can be no denial of the right of action,

[1] A portion of the opinion is omitted. — ED.

unless it be held that the legislature had no constitutional power to enact the law. Counsel for appellant contend that the statute is repugnant to sections 9, 10, 11, and 12 of article I of the constitution. These sections provide that "the right of trial by jury shall remain inviolate," and that in all criminal prosecutions, involving life or liberty, the accused shall have the right to a trial by jury, upon an indictment by a grand jury.

The jurisdiction of courts of equity to enjoin and abate nuisances is of very ancient origin. In 2 Story, Eq. 921, this language is employed: "In regard to public nuisances, the jurisdiction of courts of equity seems to be of very ancient date, and has been directly traced back to the reign of Queen Elizabeth. The jurisdiction is applicable not only to public nuisances strictly so called, but also to *purprestures* upon public rights and property." This general rule is not, and cannot be, disputed. Courts of equity in nearly all the States of the Union entertain jurisdiction to restrain and abate nuisances, either at the suit of a public prosecutor, or at the instance of a private individual, who shows that he sustains some special injury by the establishment or existence of the nuisance.

Such a case being of equitable cognizance, neither party could, at the time of the adoption of the constitution, demand a jury trial as matter of right. There was no statute law or constitutional provision then in force which gave an absolute right to a trial by jury in an equity case. State *v.* Orwig;[1] Clough *v.* Seay.[2] All actions in equity were required to be tried by a chancellor. It is true the chancellor was authorized, by the manner of procedure in courts of equity, to make up issues of fact, called issues out of chancery, and refer them to a jury to enlighten his conscience; but the parties had no right to demand a trial of any issue in an equity case by a jury.

But it is insisted by counsel for appellant that courts of equity did not have jurisdiction at the time of the adoption of the constitution to abate any nuisance, except in cases where some property right was affected by the maintenance of the nuisance; and it is contended that the enlargement of the jurisdiction to that class of cases in which property rights are not involved, is an abridgment of the right of trial by jury. The jurisdiction of the cause of action "is the power over the subject-matter given by the laws of the sovereignty in which the tribunal exists." 1 Bouv. Law Dict. 769.

Let it be conceded that courts of equity, before the adoption of the constitution, declined to entertain actions of injunction to restrain and abate nuisances in cases where no property rights were involved. The legislative history of this State, and the jurisdiction entertained by its courts, do not warrant the conclusions that there is no legislative discretion in regard to what controversies shall be of equitable cognizance. Since the adoption of the constitution, a jury has been allowed in actions for divorce, and this right has been taken away. So in case of the foreclosure of mortgages and mechanics' liens. We

[1] 25 Iowa, 280. [2] 49 Iowa, 111.

are not, then, required to examine the laws in force at the time the constitution was adopted, and hold that in every case which was then triable by a jury the right to such trial remains inviolate. Such a construction of the constitutional provision involves too narrow a view of legislative power. It being conceded that equity had jurisdiction in cases of nuisance, we can see no invasion of the rights of the citizen by an act of the legislature extending it to cases where no distinct property right is involved; and we may say here that the distinction sought to be made between nuisances where property rights are involved and where they are not, is very limited, narrow, and ill defined.

Courts constantly enjoin nuisances where no damages can be estimated in money, and where the nuisance produces mere annoyance and discomfort to the complaining party: as a manufacture producing discomfort to individuals (Catlin *v.* Valentine [1]); a blacksmith shop near plaintiff's dwelling (Faucher *v.* Grass [2]); a livery stable (Shiras *v.* Olinger [3]); a hog lot (Richards *v.* Holt [4]). These, and many other cases which might be cited, show a very great relaxation of the old rule that no action will lie to restrain and abate a public or common nuisance, unless the plaintiff, in the language of Blackstone, "suffers some extraordinary damage beyond the rest of the king's subjects by a public nuisance, in which case he shall have private satisfaction by action; as if, by means of a ditch dug across a public highway, which is a common nuisance, a man or his horse suffer any injury by falling therein, for this particular damage, which is not common to others, the party shall have his action."

It is not easy to perceive why the law-making power may not authorize the suppression of the saloon nuisance by injunction because no property rights are involved. It was always allowable to enjoin the obstruction of a public highway or a navigable stream by an action in equity at the suit of the public. This was done because it was claimed that a property right in the public was involved; and such proceedings were authorized without the aid of any statute. Such nuisances are detrimental to the public, because they obstruct travel and impede navigation. But the damages to the public are no more susceptible of computation than the injuries to the public by the unlawful maintenance of a saloon. In State *v.* Iron Cliffs Co.,[5] in discussing the power of the legislature under this provision of the constitution, it is said that "its power to create and enlarge equitable jurisdiction is not only undoubted, but unlimited." Without further dwelling upon this branch of the case, we conclude that the statute in question, so far as it authorizes the action, is not repugnant to the constitution.[6]

[1] 9 Paige, Ch. 575. [2] 60 Iowa, 505. [3] 50 Iowa, 571.
[4] 61 Iowa. 529. [5] 54 Mich. 350.

[6] Dickinson *v.* Eichhorn, 78 Iowa, 710; Cameron *v.* Tucker, 104 Iowa, 211; Carleton *v.* Rugg, 149 Mass. 550 (three judges dissenting); Inhabitants *v.* Hatch, 167 Mass. 380 (illegal stable); State *v.* Saunders, 66 N. H. 39; Manor Casino *v.* State, 34 S. W. R. 769 (Texas Civ. Ap. 1896) *Accord.* 134 N. J. 31; 96 Me. 559; 116 Ga. 401.

"Nor is there to be found a case in the entire range of American adjudications, with the

II. It is further insisted that the action in equity authorized by the statute cannot be maintained, because the legislature has no power to enforce a criminal law by a civil action. But "one maintaining a nuisance may not only be punished in a criminal proceeding, but a civil action at law to recover damages in a proper case, and an action in equity to restrain the nuisance may be prosecuted against him." Richards *v.* Holt;[1] Ewell *v.* Greenwood.[2] These cases were decided without any reference to a statute expressly authorizing an action in equity, in addition to criminal punishment. It ought not to be claimed that a statute is unconstitutional which merely provides a remedy which was available without the statute. And it must be remembered that the defendant is not convicted and punished for a crime by the injunction. It belongs to that class of remedies which may properly be provided by statute to aid in the administration of preventive justice. It stays the arm of the wrongdoer. It does not seek to punish him for any past violations of the law. Its purpose is to prevent a public offence, and suppress what the law declares to be a nuisance. The denial of a trial by jury is not as oppressive to the party charged, as the statute requiring a person who threatens to commit a public offence to give bonds with sureties to keep the peace towards the people of the State, and, in default of giving the bond, committing him to prison. Code, §§ 4115–4119. So far as we are advised, no one has ever claimed that the law requiring security to keep the peace was a denial of the right of trial by jury.

The defendant, in order to succeed in the defence that the proceeding by injunction is an attempt to enforce a criminal law by civil process, demands, in effect, that the courts must establish the principle that, because the nuisance complained of is a crime, it is entitled to favor and protection in a court of equity. Such rule would not command the respect or approval of any one.

There are many adjudged cases, aside from those above cited, which expressly hold that the fact that a nuisance is a crime, and

exception of liquor cases of doubtful validity, in which a court of equity undertook to enjoin the commission of a criminal offence, or to prevent the continuance of a nuisance where the right of property was not the foundation of the action." *Per* Gibbons, Circuit Judge, in People *v.* Chicago Association, 28 Chic. L. N. 1.

"If a statute had given jurisdiction in equity to hear without a jury an information like this, and had authorized the court, on finding the respondent guilty, to punish him in its discretion, without limit, by fine or imprisonment, or both, in what substantial respect would such a statute differ from this? The Legislature cannot do indirectly what it cannot do directly; it cannot change the nature of things by affixing to them new names. If the Legislature, by statute, can authorize a court in a public prosecution to enjoin any person from illegally keeping or selling intoxicating liquors in any specified place within the Commonwealth, why cannot it authorize a court to enjoin any person from illegally keeping or selling intoxicating liquors anywhere within the Commonwealth? and, if this can be done, why can it not authorize a court at the suit of the Commonwealth to enjoin any person from doing any illegal or criminal act anywhere within the Commonwealth, and to try without a jury any person so enjoined, on a charge of having violated the injunction, and to punish him by fine and imprisonment, without limit, if the court find him guilty?" *Per* Field, C. J., in Carleton *v.* Rugg, 149 Mass. 550, 565. — Ed.

[1] 61 Iowa, 529. [2] 26 Id. 377.

punishable as such, does not deprive equity of its jurisdiction to restrain and abate it by injunction. People *v.* City of St. Louis;[1] Attorney-General *v.* Railroad Co.;[2] Attorney-General *v.* Hunter;[3] Minke *v.* Hopeman.[4] And this rule applies to actions by private individuals, and to suits for the benefit and in behalf of the public.[5]

[1] 5 Gillman (Ill.), 351. [2] 3 Greene (N. J.) Eq. 136. [3] 1 Dev. Eq. 12. [4] 87 Ill. 450.

[5] Springfield *v.* Riley, 6 Eq. 551, 558; Atty.-Gen. *v.* Terry, 9 Ch. 423, 431; Atty.-Gen. *v.* Tod Heatley, 1897, 1 Ch. 560; *In re* Debs, 158 U. S. 564, 593; Toledo Co. *v.* Pa. Co., 54 Fed. R. 730, 744; Arthur *v.* Oakes, 63 Fed. R. 310, 329; Mobile *v.* Louisville Co., 84 Ala. 115, 126; Jones *v.* Oemler, 110 Ga. 202; People *v.* St. Louis, 10 Ill. 351, 367; Minke *v.* Hopeman, 87 Ill. 450, 454; People's Co. *v.* Tyner, 131 Ind. 277; Koehl *v.* Schoenhausen, 47 La. An. 1316; Hamilton *v.* Whitridge, 11 Md. 128; Vegelahn *v.* Gunter, 167 Mass. 92; Beck *v.* Railway Union, 110 Mich. 497, 526; Shoe Co. *v.* Saxey, 131 Mo. 212; Cumberland Co. *v.* Glass Co., 59 N. J. Eq. 49; Cranford *v.* Tyrrell, 128 N. Y. 341; Atty.-Gen. *v.* Hunter, 1 Dev. Eq. 12; Shaw *v.* Interstate Corp., 5 Oh. N. P. 411; Blagen *v.* Smith, 34 Oreg. 394; Commw. *v.* Rush, 14 Pa. 186; Pittsburgh *v.* Epping Co., 29 Pittsb. L. J. 255 *Accord.* — Ed.

CHAPTER II.

SPECIFIC PERFORMANCE OF CONTRACTS.

SECTION I.

Extent of Jurisdiction as regards Subject-matter of Contracts.

(*a*) Affirmative Contracts.

WILLIAM COKAYN *v.* THOMAS HURST.

In Chancery, February 15, 1458.

[*Select Cases in Chancery*, 10 *Selden Society*, *No.* 142.[1]]

Besechith you ful mekely your trewe seruaunt and contynuel oratour, William Cokayn, that for asmoch as of late tyme communicacion of a mariage was had and riceued bitwene your seyd suppliant, one that one partie, and Amy, the doughter of Thomas Hurst, otherwyse named Thomas Barbour, of Asshwell in the Counte of Hertford,[2] one that other partie, and accorde made of the saide mariage bitwene the said [parties] in the presence of John Enderby, Squyer, Thomas Boulasse, Thomas Crake, Henry Crosse of Biggliswade, and other, in maner and fourme as here sueth; First, that your seyd suppliant shuld take to wyfe the seyd Amy, and immediatly after th' espouselx bytwene theym halowed, he shuld and ordeigne that of such londys and tenements as he was seised of in the toun of Kimebauton in the shire of Hantyngdon[3] a sufficiant and laufull estate of the seyd londes and tenementes to the yerly value of xl s. and aboue, shuld be made to yo^r^ seyd suppliaunt and the seyd Amy ioyntly, to haue and to hold to theym and to theyr heyrs of their bothe bodyes lauffully commyng; For the which mariage and ioynture the seyd Thomas Hurst, fadre to the seyd Amy, shuld make a sufficient and laufull estat of a mesuage with appurtenaunces in the seyd toun of Asshwell to the yerly value of xx s., and in xxx acres of land in Stepulmordon[4] to the yerly value of xxv s., aboue all reprises, to haue and to hold the seyd mesuage and xxx acres with their appurtenaunces to your seyd suppliant and Amy and to the heyrs of theyr bothe bodyes laufully commyng. And howe be it that yo^r^ seyd suppliant hath well and truly performed almaner thynges abouesayd touchying his partie,

[1] Early Chancery Proceedings, Bundle 25, No. 111. Thomas Bourchier, Archbishop of Canterbury, was Chancellor.

[2] Near Royston. [3] Kimbolton. [4] Co. Cambridge, near Royston.

and oft tymes hath requyred the seyd Thomas Hurst to perfourme the premysses touchyng his partie, and that to doo he hath refused and yet refuseth ageyns all right and conscience: Please your highnesse the premysses tenderly to considre, and for asmoch as the seyd Thomas Hurst is visited with suche sikenes that he may not travayle, to graunt a writ of *dedimus potestatem* direct to John Leek clerk, William Seintgeorge, knyght, and William Hasilden, Squyer, that they and euery of them may ioyntly and seuerally haue power to examyn the seyd Thomas Hurst and all other persones which shall seme to theyr discrecions most necessarie to be examyned in the premysses and suche as shall be found by that examynacion to certefye the kynge's highnesse in his high Court of the Chauncerye; and yo^r sayd supplyant shal pray God for you.[1]

Indorsed on the bill. Memorandum quod quinto-decimo die Februarii, anno regni, Regis Henrici sexti post conquestum Anglie tricesimo sexto, ista peticione coram dicto domino Rege in Cancellaria sua ac examinacionibus in hac parte captis in eadem Cancellaria lectis auditis et plenius intellectis, visum est Curie Cancellarie predicte materiam in peticione predicta specificatam fore veram et iustam, ac pro eo quod Amia, in peticione illa specificata, mortua existit, exitu de corpore suo et corpore infrascripti Willelmi legitime procreato adhunce superstite, Consideratum existit in eadem Cancellaria quod infrascriptus Thomas Hurst sufficientem statum de vno mesuagio et triginta acris terre cum pertinenciis in Asshewell et Stepulmordon in peticione predicta specificatis faceret predicto Willelmo et heredibus de corpore suo et corpore prefate Amie legitime procreatis, iuxta vim, formam, et effectum peticionis predicte.[2] [3]

[1] A writ of *dedimus potestatem* was granted. An account of this, and a translation of the Latin indorsement on the bill is omitted. — Ed.

[2] *Specific performance* of the agreement is what is asked for and decreed. The commission sent by the writ of *dedimus potestatem* is not in the nature of the commissions formerly referred to (p. 29, note 1). The commissioners had only power to take the defendant's answer, to examine witnesses and to report. The practice of taking the defendant's answer by commission continued for a long period. See Spence, i. 372.

[3] Mr. Spence, in his Equitable Jurisdiction (vol. i. p. 645), and Lord Justice Fry, in his Specific Performance (2d ed. p. 8; 3d ed. p. 15), have regarded specific performance as one of the most ancient heads of equity jurisdiction. The cases cited by these eminent authors seem hardly to justify their opinion, being either cases of uses — Scales *v.* Feltbrigge (1448), 2 Cal. Ch. xxvi.; Jonesse *v.* Penely (Hen. VI.), 2 Cal. Ch. xxxv.; Furby *v.* Martyn (1460–1465), 2 Cal. Ch. x. (see, also, Monye *v.* Hendrys (no date), Sel. Cas. Ch., 10 Seld. Soc'y, No. 127), or cases in which the relief sought was probably reimbursement for expenses incurred rather than specific performance — Wheler *v.* Huchynden (Rich. II.), 2 Cal. Ch. ii.; Anon. Y. B. 8 Ed. IV. 4–11 (see, also, Wace *v* Brasse (after 1398), Sel. Cas. Ch. 10 Seld. Soc'y, No. 40; Kymberly *v.* Goldsmith (1424–1426), 1 Cal. Ch. xx.; Tyrgelden *v.* Wareham (1467–1473), 2 Cal. Ch. liv.). Accordingly, the writer of this note, in an article in 1 Green Bag, 26, advanced the view that specific performance was a comparatively modern doctrine, not older, so far as appeared from reported cases, than the middle of the sixteenth century. The subsequent publication, in 1896, by the Selden Society, of Select Cases in Chancery, in which the case of Cokayn *v.* Hurst is brought to light, compels the writer so far to modify his opinion as to admit that equity decreed specific performance of an agreement in one case in the middle of the fifteenth century. In a still earlier case, William *v.* Gile (1396–1403), Sel. Cas. in Ch., 10 Seld. Soc'y, No. 83, a plaintiff, who had released his right to land to the defendant upon the latter's agreement to convey the same to the plaintiff for life, prayed for specific performance. But we are not told what relief, if any,

the court gave. Even if he obtained a decree for a life estate, he got less than he was entitled to, for on the principle of *restitutio in integrum* and by analogy to the cases of reimbursement for expenses, he might well have prayed for a reconveyance of the fee simple. Bradwell *v.* Clopton (1413-1417), Sel. Cas. in Ch., 10 Seld Soc'y, No. 114, cited by Mr. Baildon as an instance of specific performance, contains no allusion to this form of relief.

It still remains true, therefore, that for nearly a century, Cokayn *v.* Hurst is the solitary reported instance of a decree for the specific performance of a contract. In 1547, in Carrington *v.* Humphrey, Toth. 14, "it is ordered that the defendant and his wife shall make an absolute assurance for the extinguishment of her right in the land." This may have been specific performance of an agreement. Brooke, who died in 1558, drawing the distinction between law and equity, says, in his Abridgment, that the promisee "shall have only damages by this [action on the case], but by *subpœna* the chancellor may compel him to execute the estate or imprison him, *ut dicitur*." (Bro. Ab. Act on Case, pl. 72.) The words *ut dicitur* are suggestive of novelty. This suggestion is reinforced by the statement of Dyer, J., in 1557 (Wingfield *v.* Littleton, Dy. 162 a): "And no *subpœna* will lie for her [the covenantee], as for a *cestui que use*, to compel Sir A. [the covenantor] to execute the estate, . . . because she has her remedy at common law, by action of covenant."

In the reign of Elizabeth, however, there are several reported cases in which specific performance of contracts was decreed (Pope *v.* Mason (1569), Toth. 3; Hungerford *v.* Hutton (1569), Toth. 62; Onely's Case (1578), Dy. 355, 356 a; Benther *v.* Denton (1582), Toth. 4; Foster *v.* Eltonhead (1582), Toth. 4; Kempe *v.* Palmer (1594), Toth. 14; King *v.* Reynolds (1597), Ch. Cas. Ch. 42; Beeston *v.* Langford (1598), Toth. 14).

There were many similar decrees in the reign of James I., one of which, according to Tothill, was "by the judges advice." (Throckmorton *v.* Throckmorton (1609), Toth. 4.) This is, possibly, an error of the reporter. At all events, the hostility of the common law judges to the jurisdiction of equity over contracts was very plainly expressed, two years later, by Fleming, C. J., in Gollen *v.* Bacon (1 Bulst. 112): "If one doth promise for to give me a horse for twenty shillings, afterwards he doth not perform this; I am not in this case to go and sue in Chancery for my remedy, but at the common law, by an action on the case for a breach of promise and so to recover damages; and this is the proper remedy, and the common law warrants only a remedy at the common law; and if the law be so in the case of a horse, *a multo fortiori* it shall be so in case of a promise to make an assurance of his land upon good consideration, and doth not perform it, he is not to sue in chancery for this, but at the common law, which is most proper." Croke, J., and Yelverton, J., agreed herein with the chief justice, who added: "There are too many causes drawn into chancery to be relieved there, which are more fit to be determined by trial at the common law, the same being the most indifferent trial, by a jury of twelve men." As might be supposed, the most determined opponent of this new encroachment of equity upon the common law was Lord Coke. In Bromage *v.* Genning (1 Roll. R. 368), the plaintiff applied to the King's Bench for a prohibition against a suit for specific performance of a lease brought against him in the marches of Wales, on the ground that Genning's proper remedy was an action at law. Serjeant Harris, in reply, urged that the object of the suit was not the recovery of damages, but the execution of the lease, and that this was regularly done in chancery. Coke, C. J., Doddridge and Houghton, JJ.: "Without doubt a court of equity ought not to do so, for then to what purpose is the action on the case and covenant; and Coke said that this would subvert the intent of the covenantor, since he intended to have his election to pay damages or to make the lease, and they would compel him to make the lease against his will; and so it is if a man binds himself in an obligation to enfeoff another, he cannot be compelled to make the feoffment." Serjeant Harris then confessed that he acted in the matter against his conscience, and the court accordingly granted the prohibition.

This was in 1616, the year of the memorable contest between Lord Coke and Lord Ellesmere as to the power of equity to restrain the execution of a common law judgment obtained by fraud. Lord Coke's defeat in that contest is matched by his failure to check the jurisdiction of the chancellor in matters of contract. The right of equity to enforce specific performance, where damages at law would be an inadequate remedy, has never since been questioned. — ED.

DUKE OF SOMERSET *v.* COOKSON.

IN CHANCERY, BEFORE LORD TALBOT, C., MICHAELMAS TERM, 1735.

[3 *Peere Williams*, 390.]

THE Duke of Somerset, as lord of the manor of Corbridge, in Northumberland (part of the estate of the Piercys late Earls of Northumberland), was intitled to an old altar-piece made of silver, remarkable for a Greek inscription and dedication to Hercules. His Grace became intitled to it as treasure trove within his said manor. This altar-piece had been sold by one who had got the possession of it, to the defendant, a goldsmith at Newcastle, but who had notice of the Duke's claim thereto. The Duke brought a bill in equity to compel the delivery of this altar-piece in *specie*, undefaced.

The defendant demurred as to part of the bill, for that the plaintiff had his remedy at law, by an action of *trover* or *detinue*, and ought not to bring his bill in equity; that it was true, for writings savoring of the realty a bill would lie, but not for anything merely personal; any more than it would for an horse or a cow. So, a bill might lie for an heirloom; as in the case of Pusey *v.* Pusey.[1] And though in *trover* the plaintiff could have only damages, yet in *detinue* the thing itself, if it can be found, is to be recovered; and if such bills as the present were to be allowed, half the actions of *trover* would be turned into bills in chancery.

On the other side it was urged, that the thing here sued for was matter of curiosity and antiquity; and though at law, only the intrinsic value is to be recovered, yet it would be very hard that one who comes by such a piece of antiquity by wrong, or it may be as a trespasser, should have it in his power to keep the thing, paying only the intrinsic value of it: which is like a trespasser's forcing the right owner to part with a curiosity, or matter of antiquity, or ornament, *nolens volens*. Besides, the bill is to prevent the defendant from defacing the altar-piece, which is one way of depreciating it; and the defacing may be with an intention that it may not be known, by taking out, or erasing some of the marks and figures of it; and though the answer had denied the defacing of the altar-piece, yet such answer could not help the demurrer; that in itself nothing can be more reasonable than that the man who by wrong detains my property, should be compelled to restore it to me again in *specie*; and the law being defective in this particular, such defect is properly supplied in equity,

Wherefore it was prayed that the demurrer might be overruled, and it was overruled accordingly.[2]

[1] 1 Vern. 273.

[2] It will be observed that the principal case was one of specific reparation for a tort, and

DOWLING *v.* BETJEMANN.

IN CHANCERY, BEFORE SIR W. PAGE WOOD, V. C., MAY 27, 1862.

[2 *Johnson and Hemming*, 544.]

By an agreement, dated September 17, 1861, between the plaintiff, Dowling, an artist, and the defendants H. J. & G. S. Betjemann, picture dealers, the defendants were to have the exclusive right of engraving a picture of "The Raising of Lazarus," painted by the plaintiff, and of exhibiting the picture for the space of two years, paying

not of specific performance of a contract. But the principle of jurisdiction in the case of chattels is the same, whether the relief sought is specific performance of a contract, specific reparation for a tort, or an injunction against a threatened tort or breach of contract. In the following cases relief was given in one of these three forms because of the peculiar nature of the chattel.

Specific performance of a contract. — Fells *v.* Read, 3 Ves. Jr. 70 (silver tobacco box with engravings of public transactions); Nutbrown *v.* Thornton, 10 Ves. 159 (stock on a farm essential for cultivation of farm); Lowther *v.* Lowther, 13 Ves. 95 (a Titian); Claringbould *v.* Curtis, 21 L. J. Ch. 541 (a barge); Falcke *v.* Gray, 4 Drew. 651 (*semble*, — rare China jars); Thorn *v.* Commissioners, 32 Beav. 490 (old Portland stone from Westminster Bridge); Hart *v.* Herwig, 8 Ch. 860, 866 (*semble*, — foreign ship); Batthyany *v.* Bouch, 50 L. J. Q. B. 421 (*semble*, — a yacht); Brady *v.* Yost (Idaho, 1898), 55 Pac. R. 542 (newspaper business, with chattels and fixtures of the plant); McMullen *v.* Van Zant, 73 Ill. 190 (promissory note); Hood *v.* Miller, 2 Duv. 103 (*semble*, — promise to pay gold); Hall *v.* Hiles, 2 Bush, 532 (*semble*, — promise to pay gold. But by Hovey *v.* Nickerson, 14 All. 400, such a promise is a promise to pay money); Pattison *v.* Skillman, 34 N. J. Eq. 344 (letters and papers relating to a title); Williams *v.* Howard, 3 Murph. 74 (*semble*, — slaves. But see Pearne *v.* Lisle, Amb. 75, 77, *semble contra*); Sloane *v.* Clauss (Ohio, 1901), 59 N. E. R. 884 (heirlooms); McGowin *v.* Remington, 12 Pa. 56 (private papers, maps, plans, and charts); Brown *v.* Gilliland, 3 Dess. 539 (slaves); Sarter *v.* Gordon, 2 Hill, Ch. 121 (slaves); Summers *v.* Bean, 13 Grat. 404 (slaves).

Specific reparation for a tort. — Pusey *v.* Pusey, 1 Vern. 273 (Pusey horn, emblem of title); Jackson *v.* Butler, 2 Atk. 306 (mortgage deeds); Lloyd *v.* Loaring, 6 Ves. 773 (dresses, decoration books and papers of a society); Duncombe *v.* Mayer, 8 Ves. 319 (title deeds); Macclesfield *v.* Davis, 3 V. & B. 18 (heirlooms); E. I. Co. *v.* Kynaston, 3 Bligh, 153,165 (approves Somerset *v.* Cookson); Goodale *v.* Goodale, 16 Sim. 316 (bill by executor to recover securities of the estate); Gibson *v.* Ingo, 6 Hare, 112 (certificate of registry of ship); Beresford *v.* Driver, 14 Beav. 387, 16 Beav. 134 (documents relating to title to land); Williams *v.* Carpenter, 14 Colo. 477 (title deeds); Gough *v.* Crane, 3 Md. Ch. 119 (choses in action); Anon., 9 Miss. 235, cited (madstone); Murphy *v.* Clark, 9 Miss. 221 (slaves); Butler *v.* Hicks, 19 Miss. 78 (slaves); Hull *v.* Clark, 22 Miss. 187 (slaves); Brown *v.* Goolsby, 34 Miss. 437 (*semble*, — slaves. No jurisdiction because defendant had parted with slaves before bill filed); Schraff *v.* Wolters (New Jersey Eq. 1901), 48 Atl. R. 782 (bill by executor to recover securities of the estate); Stanton *v.* Miller, 65 Barb. 58 (deed in escrow); Lawler *v.* Kell, 6 Oh. Dec. 311 (stock certificate); Baum's App., 113 Pa. 58 (deed in escrow); Dock *v.* Dock, 180 Pa. (private letters); Beasley *v.* Allyn, 15 Phila. 97 (wooden bowl, a college memento); Young *v.* Burton, 1 McMull. 255 (slaves, — overruling Reese *v.* Parish, 1 McC. Ch. 56, and Farley *v.* Farley, 1 McC. Ch. 506. But no specific restitution for a mortgagee as to slaves, Bryan *v.* Robert, 1 Strob. Eq. 334); Hovey *v.* Glover, 2 Hill, S. Ca. 516 (slaves); Ellis *v.* Commander, 1 Strob. Eq. 188 (slaves); Sims *v.* Shelton, 2 Strob. Eq. 221 (slaves); Henderson *v.* Vaulx. 10 Yerg, 30, 37 (slaves); Womack *v.* Smith, 11 Humph. 478 (slaves).

Injunction against a threatened tort or breach of contract. — Arundell *v.* Phipps, 10 Ves. 139 (family pictures); Henderson *v.* Vaulx, 10 Yerg. 30 (slaves); Pope *v.* Eakin, 3 Humph. 413 (*semble*, — slaves. But not if title is doubtful); Randolph *v.* Randolph, 6 Rand. 194 (slaves. But see Allen *v.* Freeland, 3 Rand. 170, where no injunction issued, because plaintiff had no personal interest in the slaves). — ED.

for these rights, on or before November 1, 1862, £150. They were also to have the privilege of buying the picture, for the further sum of £150, to be paid on or before November 1, 1863. The defendants were to keep the picture insured for £300, and on failure to keep any part of their agreement were to surrender the picture on demand.

The defendants did not have the picture engraved, but exhibited it. They failed to insure it and they paid only £50 of the £150 due for the right to engrave and exhibit it.

On March 8, 1862, the defendants sold the picture to the defendant Gotto, for £375, who claimed to be a purchaser for value without notice of the agreement, and then concealing the sale offered the plaintiff £200 instead of £300. The plaintiff having discovered this sale demanded the picture of the Betjemanns and of Gotto, but without success.

The object of the plaintiff's bill was either to obtain £250, or the surrender of the picture, upon the repayment of £50 to the defendants.[1]

Vice-Chancellor Sir W. Page Wood. This case involves some points of considerable interest; but from the first it has appeared to me, that the great difficulty on the part of the plaintiff was in making out the jurisdiction of this court to interpose in a case so circumstanced as the present. That the court has jurisdiction to order the delivery of a specific chattel of a peculiarly valuable kind, such as a picture, I have never entertained a doubt; but the observations in Fells *v.* Reed[2] and cases of that class apply only to chattels of which the value cannot be properly ascertained by a jury. They would very pointedly apply to the case of an artist insisting that the value of his picture should not be left to the estimate of a jury. But the difficulty which has weighed on my mind throughout the case is, that the bill is framed, not by any slip, but advisedly and of necessity, on this principle: the plaintiff has agreed to sell his picture, at a given time and under certain circumstances, for the sum of £300; he has granted the right of engraving the picture and of exhibiting it for a fixed time for £150, at the end of which he agrees to part with the picture itself for the payment of the further sum of £150. The prayer of the bill is founded on the idea that there was some positive engagement to engrave and exhibit the picture, but, on the contrary, the actual agreement was, that the defendants, Messrs. Betjemann, should pay for the privilege of engraving and exhibiting the picture, without any undertaking on their part to do anything of the kind. It is equally clear that the plaintiff retained the property in the picture during this interval. I cannot for a moment entertain the argument that the property passed to Messrs. Betjemann immediately on the execution of the agreement. The terms of the contract are quite conclusive on that point. The rights of the parties under the agreement are plain. The plaintiff agrees to sell at a given future time, and in the meantime to allow the

[1] The statement of facts has been condensed, and only the judgment of the court on the point of jurisdiction is given. — Ed.

[2] 3 Ves. 70.

exhibition and engraving of the picture without parting with the property.

Then the bill is framed on this principle: It claims the property subject to the agreement. The first paragraph of the prayer asks a declaration that the picture is the property of the plaintiff until payment, and until the picture shall have been duly exhibited and engraved (this last condition being founded on a mistaken view of the agreement). Then the prayer goes on to claim a lien for the unpaid purchase-money, and that the agreement may be cancelled unless the same is paid and the picture duly exhibited and engraved. It was, moreover, admitted at the bar that the payment of the £300 would dispose of the whole question in the suit. That is the fair view of the case which is made by the bill. Upon this an insuperable difficulty arises in the way of the jurisdiction which this court exercises, to order the delivery of a specific chattel of a peculiar value, as in the Pusey Horn case. In such a case as this it appears to me that it would be an innovation on the practice of the court, to say that a jury could not adequately estimate by damages the non-payment of a price fixed, as it is here, by the agreement of the parties.

The bill might possibly have been framed on this footing. It might have said, "You have broken the agreement, and I insist that it shall be cancelled, and that my picture shall be restored." I do not say that that contention might not have prevailed. But upon the bill as it stands the plaintiff says, he is quite satisfied with the agreed price of £300, and it is only in the event of that not being paid that he asks for the restoration of the picture. That reduces the contest to a mere money demand. The plaintiff has bound himself to sell for £300. He says the defendants have attempted to cheat him out of the price, and comes, not primarily to have the chattel returned on the ground of its intrinsic value, but to have the contract performed. The same considerations which dispose of the claim to have the picture returned, also displace the right to have a vendor's lien on the picture enforced in this court.

The plaintiff may get the value he has himself put upon his picture from the verdict of a jury. No doubt has been suggested as to Gotto's solvency, and very strong arguments have been urged to show that Gotto would have no defence to an action of trover. According to his own arguments, the plaintiff will get at law the £300, which is all that he asks by this bill. The difficulty in this court is, that he does not found his bill on the right to have a specific chattel restored, but on his title to be paid the price of £300, with which he still professes to be content.[1]

[1] Statute 56 & 57 Vict. c. 71, § 52, enacts that: "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

Repetition of the Act of 1854. In Eng. you can get a warrant for the specific chattel in almost any action of delivery. Dean thinks has not known how far the court has

WOOD *v.* ROWCLIFFE.

IN CHANCERY, before SIR J. WIGRAM, V. C., JANUARY 19, 1844.

[3 Hare, 304.]

VICE-CHANCELLOR:[1] —

The case alleged by the bill is, that certain specific chattels, described in an inventory, were placed in the possession of Elizabeth Wright, to be held by her as the agent of the plaintiff; and that, in breach of her duty to her principal, she has contracted for the sale of these goods to a third party: and the question is, whether a court of equity will not, at the suit of the principal, restrain his agent from parting with the possession of his property, by which the plaintiff's title would be embarrassed, if not defeated? I have not the slightest doubt that the plaintiff is entitled to the protection of the court against the wrongful act which is threatened by his agent. I have known many bills to have been filed in the Court of Exchequer, formerly, on behalf of the owners of cargoes, to prevent improper dealings with the goods by their agents, or persons in the situation of agents. The right to be protected in the use or beneficial enjoyment of property in specie is not confined to articles possessing any peculiar or intrinsic value. In this case, the plaintiff is clearly entitled to the injunction to restrain the sale of the goods, in order to carry into effect the attempted alienation of the property by Elizabeth Wright, and the right to the injunction will sustain the bill.

I proceed upon the ground that the furniture and effects are still in the possession of Elizabeth Wright; for, upon the allegations in the bill, that must be taken to be the case. I think the charge, that the plaintiff has applied to Rowcliffe for possession of the property, does not displace the previous allegation, that it is actually held by Elizabeth Wright on behalf of the plaintiff, and that her possession ever since August, 1840, has been the virtual possession of the plaintiff himself. I do not say that the bill could be sustained in its present shape, if, by the statements, the property appeared to be in Rowcliffe's possession; nor do I give any opinion the other way.

Upon the question raised by the demurrer, the charge, that the transaction respecting the alleged assignment to Rowcliffe is a fraud concerted by him and the other defendant and Knight as against the plaintiff, becomes also material.

Demurrer overruled.[2]

"The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland." — ED.

1 Only the judgment of the court is given. — ED.

2 Affirmed by Lord Cottenham, 2 Ph. 382, who said, p. 383: "The cases which have been referred to are not the only class of cases in which this court will entertain a suit for delivering up of specific chattels. For, where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee or a broker, or whether the subject-

JOHN T. PARKER *v.* LEWIS GARRISON AND OTHERS.

IN THE SUPREME COURT, ILLINOIS, SEPTEMBER TERM, 1871.

[*Reported in* 61 *Illinois Reports*, 250.]

APPEAL from the Circuit Court of Kankakee County; the Hon. Charles H. Wood, Judge, presiding.

The bill alleges that John T. Parker, about the first of February, 1870, agreed to sell a tract of land to Lewis Garrison for $4620, to be paid in instalments, with interest; that nothing was paid on the purchase, but Garrison went into possession of the land and occupied and raised a crop of corn, etc., thereon; that, having failed, and being unable to pay the first instalment falling due, Garrison prevailed on Parker to release him from the purchase, with the agreement that Parker should treat him as a tenant, and receive from him, for the use of the land during the year 1870, one half of the crops raised on the land that year, but all to be paid in corn; that Garrison raised on the premises three thousand bushels of corn and four hundred bushels of oats; that Garrison had hauled to Manteno and delivered to Adam Sockie, Leon Euzier and Gardiner P. Comstock, about six hundred

matter be stock, or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him, through an alleged abuse of power."

See, to the same effect, Schraff *v.* Wolters (N. J. Eq. 1901), 48 Atl. R. 782. 63 A. & E. 793.

TRUSTS OF CHATTELS. — An express trust of a chattel is, of course, enforceable in equity. Indeed, since the trustee has the legal title, and there is no common law contract, the jurisdiction of equity is exclusive.

As to constructive trusts a distinction must be made.

If one acquires from the plaintiff by a tort the title to a chattel, or unconscionably retains a title, honestly acquired from the plaintiff, equity might, with propriety, compel him, as a constructive trustee, to reconvey the chattel, just as in early times decrees were made for the payment of money got by fraud, or though properly acquired, unjustly withheld, as in the case of failure of consideration. But at the present day the defrauded person must seek his relief at law, unless damages for the deceit would be an inadequate remedy, either because of the peculiar nature of the chattel, or because of the insolvency of the defendant. Edelman *v.* Latshaw, 159 Pa. 644; Corn Bank *v.* Solicitors Co., 188 Pa. 330; Steinmeyer *v.* Siebert, 190 Pa. 471.

If, on the other hand, a wrongdoer acquires the title to a chattel from a third person by the misuse of the plaintiff's property; if, for example, a fiduciary, a fraudulent purchaser, or a converter, by a breach of trust or a wrongful transfer of the fraudulently acquired or converted property, acquires in exchange the legal title to a chattel, equity will compel him to hold the newly acquired chattel in trust for the plaintiff. The cases in support of the doctrine that a fiduciary holds the product of the trust fund for the beneficiary are legion. Many of them are cited in Ames, Cas. on Trusts (1st ed.), 325. See, also, Johnson *v.* Brooks, 93 N. Y. 337. The authorities in favor of the rule that a fraudulent purchaser or a converter come within the same rule, though less numerous, are decisive. Regina *v.* Brinkall, Leigh & Cave, 371, 376 (*semble*); Smith *v.* Atwood, Younge, 607; Cattley *v.* Loundes, 34 W. R. 139: *Re* Hulton, 39 W. R. 303, 8 Morrell, 69, s. c.; La Comité des Assurances, 1 Cab. & E. 87; Humphrey *v.* Butler, 51 Ark. 351; Pirtle *v.* Price, 31 La. An. 357; Nat. Bank *v.* Barry, 125 Mass. 20; Farwell *v.* Homan, 45 Neb. 424 (*semble*); Nebraska Bank *v.* Johnson, 51 Neb. 546; Bank of America *v.* Pollock, 4 Edw. 215; Newton *v.* Porter, 69 N. Y. 133; American Co. *v.* Faucher, 145 N. Y. 552; Converse *v.* Sickels, 146 N. Y. 200; Reynolds *v.* Ætna Co., 28 N. Y. Ap. Div. 591. — ED.

bushels of the corn, and stored the same in his own name, and was hauling the remainder to them to be stored in the same manner; that Sockie, Euzier & Co. refused to let Parker have the corn or to pay him for the same, and that Garrison is insolvent, and intended to defraud complainant out of his rent. The bill makes them all defendants, and prays that Sockie, Euzier & Co. be restrained from delivering the grain to, or paying Garrison therefor, and that he be restrained from selling, mortgaging, pledging, etc., the grain.

To this bill a demurrer was filed, which the court sustained and dismissed the bill, and complainant appeals to this court.

Mr. Justice SHELDON delivered the opinion of the court:

The question presented by the record in this case is, whether chancery will entertain jurisdiction of a bill for injunction in the nature of a specific performance of an agreement respecting personal chattels.

There is a distinction taken in equity, in regard to specific performance, between contracts which relate to land and those which relate only to personal chattels, the general rule being that equity will give this relief in contracts of the first, but not in those of the latter kind.

This distinction proceeds upon the ground that, in the case of real estate, damages at law may not afford a complete remedy, but that in the case of personal property a compensation in damages furnishes an adequate remedy.

But this general rule, not to entertain jurisdiction in equity to enforce contracts in relation to personalty, is subject to exceptions, or rather, as Judge Story says in his Commentaries, is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. 2 Story Eq. Ju. sec. 718.

As shown by the bill, complainant has an interest in the corn which is the subject of this suit. It justly and equitably belongs to him. The defendant Garrison had received from him the entire consideration for it in being released from his contract of purchase, and in having enjoyed the use and possession of the land purchased, during the year 1870, and it was his plain duty to deliver the corn to the complainant at Manteno; but in violation of his duty, and in fraud of the complainant's rights, he was about disposing of, and appropriating to his own use, the property, so that it would be placed beyond the reach of the complainant.

What had the complainant in the way of any adequate remedy at law? Garrison was insolvent. Any recovery of damages against him would have been worse than bootless, as it would only have entailed upon the complainant an additional loss in the form of a bill of costs. And although this view of the personal responsibility of a defendant seldom seems to enter into the consideration of courts of equity, they taking it for granted that what a party is bound by law to do, he can do and will do, this consideration of personal responsibility is not always disregarded.

In a suit for the transfer of stock according to a contract of sale, where performance was decreed, it was given as a reason that a court of law could not give the property, but could only give a remedy in damages, the beneficial effect of which must depend upon the personal responsibility of the party. Doloret *v.* Rothschild.[1]

The remedy by replevin, at least, would have been doubtful and uncertain from the difficulty of showing a legal title in the specific property, there having been no delivery, and the corn agreed to be delivered having been, at the time of the agreement, an undivided portion of a larger quantity of corn. It would have involved, too, the necessity of several suits, as a part of the property was in the possession of Sockie, Euzier & Co., and a portion still remained in the hands of Garrison.

The complainant's fit remedy was, to have restrained any further disposition of the property, and to have Sockie, Euzier & Co. restrained from paying over to Garrrison the proceeds of what had been disposed of, and this, only a court of equity could give.

It was said, in the case of Clark *v.* Flint,[2] being a bill in equity for the specific performance of a contract relating to personal property, "If the party injured by a breach of a contract cannot avail himself of his remedy at law for any beneficial purpose, or if it be doubtful whether he can or not, a court of equity, if it can relieve him, ought certainly to interpose and compel the other party to perform his contract."

We are of opinion that the bill makes a case for the interference of a court of equity, upon the fundamental rule of equity jurisdiction that there is not a plain, adequate, and complete remedy at law. 2 Story Eq. Ju. secs. 718, 708, 89, 721; Clark *v.* Flint, supra; Mechanics' Bank of Alexandria *v.* Seaton;[3] Osborn *v.* The Bank of the United States;[4] Wood *v.* Rowcliff; Adderley *v.* Dixon; Sullivan *v.* Tuck.[5]

It would seem, too, that jurisdiction might be exercised here on the ground of executing a trust. With respect to a personal chattel, equity will enforce a *trust* concerning it, but not a contract.

The mere contract for the sale and delivery of a chattel cannot, as would a contract of sale in the case of land, create a trust.

But it has been held that, if the contract in regard to personalty be complete so far as the vendor is concerned, if he has been paid all that he was entitled to and has no claim upon the property arising from the contract, and the contract only remains unperformed to the extent that the property has not been delivered to the purchaser, then the vendor would become a mere trustee of the property for the benefit of the purchaser. Pooley *v.* Rudd.[6]

The bill seems to present such a case.

The court below should have overruled instead of sustaining the demurrer to the bill.

[1] 1 Sim. & Stu. 590.
[2] 22 Pick. 231.
[3] 1 Pet. 299.
[4] 9 Wheat. 738.
[5] 1 Md. Ch. Dec. 59.
[6] 14 Beav. 34.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.[1] *Decree reversed.*

BUXTON *v.* LISTER AND COOPER.

IN CHANCERY, BEFORE LORD HARDWICKE, C., JULY 15, 1746.

[3 *Atkyns*, 383.]

THE defendants entered into an agreement for the purchase of several timber trees, marked and growing at the time it was reduced into writing: and on the first of November, 1744, the following memorandum was signed by the parties: —

"Matthew Lister and John Cooper have agreed with Joseph Buxton for the purchase of all those several large parcels of wood, consisting of oaks, ashes, elms, and asps, which are numbered, figured, and cyphered, standing and being within the township of Kirkby, for the sum of 3050*l.*, to be paid at six several payments, every Lady Day for the six following years; and Lister and Cooper to have eight years for disposing of the same; and that articles of agreement shall be drawn and perfected as soon as conveniently can be, with all the usual covenants therein to be inserted concerning the same."

There were two parts of the agreement.

The plaintiff signed one, and the defendants the other; one was left in the custody of the plaintiff, and the other in the custody of the defendants.

The bill was brought by the vendor for the specific performance of the agreement.

LORD CHANCELLOR, upon the opening, said, he did not know any instance of a bill of this nature, where it is a mere chattel only, and nothing that affects the realty.

That a bill might as well be brought for compelling the performance of an agreement for the sale of a horse, or for the sale of stock, or any goods or merchandise.

Sir Joseph Jekyll did, in Cud *v.* Rutter, decree a specific performance in the case of a chattel, but Lord Macclesfield reversed it, and it has been the rule of the court ever since not to retain such a bill.

The proper remedy is an action at law, where you may recover damages for the non-performance of the agreement.

[1] The insolvency of the defendant was thought to be a sufficient ground for enforcing specific performance of a contract for ordinary chattels in Doloret *v.* Rothschild, 1 S. & S. 590, 598; Dowling *v.* Betjemann, *supra*, 45; Young *v.* Matthews, L. R. 2 C. P. 127, 129; Hamilton *v.* Nat. Bank, 3 Dill. 230; Dilburn *v.* Youngblood, 85 Ala. 449, 451; Treasurer *v.* Commercial Co., 23 Cal. 390, 393; Williams *v.* Carpenter, 14 Colo. 477 (*semble*); Ames *v.* Witbeck, 179 Ill. 458, 475; Clark *v.* Flint, 22 Pick. 231; Corn Bank *v.* Solicitors Co., 188 Pa 330; Allen *v.* Freeland, 3 Rand. 170, 174; Avery *v* Ryan, 74 Wis. 591, 600; Glassbrenner *v* Groulik (Wis. 1901), 85 N. W. 962. — ED.

10 Fed. 662; 168 U.S. 471-88; 1 J. Eq 1898, 75 Am. Rep. 278;

The defendants' counsel, to show the impropriety of such a bill, and that the parties ought to be left to law, cited Roll's Reports, 493, and Latch's, 172.

Upon hearing what the plaintiff's counsel could alledge, in order to take this case out of the general rule of the court, LORD CHANCELLOR delivered his opinion as follows: —

The general question is, as to the decree for specific performance, and this divides itself into two subordinate ones.

First, Whether the plaintiff is entitled to seek his remedy in a court of equity for a specific performance.

Secondly, whether, as to the merits of this case, he is entitled to such a decree.

As to the first, I am of opinion, that this is such an agreement, though for a personal chattel, that the plaintiff may come here to have a specific performance.

To be sure, in general this court will not entertain a bill for a specific performance of contracts of stock, corn, hops, &c., for as those are contracts which relate to merchandise, that vary according to different times and circumstances, if a court of equity should admit such bills, it might drive on parties to the execution of a contract, to the ruin of one side, when upon an action, that party might not have paid, perhaps, above a shilling damage.

Therefore the court have always governed themselves in this manner, and leave it to law, where the remedy is so much more expeditious.

As to the cases of contracts for purchase of lands, or things that relate to realties, those are of a permanent nature; and if a person agrees to purchase them, it is on a particular liking to the land, and is quite a different thing from matters in the way of trade.

But, however, notwithstanding this general distinction between personal contracts, and for goods, and contracts for lands, yet there are indeed some cases where persons may come into this court though merely personal, and the plaintiff's counsel have cited a case in point, Taylor *v.* Neville.[1]

That was for a performance of articles for sale of eight hundred ton of iron, to be paid for in a certain number of years, and by instalments, and a specific performance was decreed.

Such sort of contracts as these differ from those that are immediately to be executed.[2]

[1] *Vide* Colt *v.* Netterville, 2 P. W. 304; Thompson *v.* Harcourt, 2 Bro. Par. Ca. 415.

[2] Equitable *v.* Baltimore Co., 63 Md. 285, 289 (*semble*); Furman *v.* Clark, 3 Stockt. 306 (*semble* — 5000 bushels of clay a year for seven years); Stuart *v.* Pennis, 91 Va. 688 (all poplar trees on a tract of land in three years to be paid for as taken) *Accord*.

But in Pollard *v.* Clayton, 1 K. & J. 462, 476, 477, Wood, V. C., said: "I cannot help further making the observation, that, notwithstanding the case of Taylor *v.* Neville and the approbation it met with from Lord Hardwicke in Buxton *v.* Lister, it seems to me somewhat singular, looking to the large mercantile community of this country, that we do not find in the books since the case of Taylor *v.* Neville (a case not in Peere Williams, not reported at all, and apparently only cited from manuscript) a single case of a bill for the performance of any contract for the mere supply of goods, — cotton, wool, or the like, on

There are several circumstances which may concur.

A man may contract for the purchase of a great quantity of timber, as a ship carpenter, by reason of the vicinity of the timber, and this on the part of the buyer.

On the part of the seller, suppose a man wants to clear his land, in order to turn it to a particular sort of husbandry, there nothing can answer the justice of the case but the performance of the contract in specie.

In the case of John Duke of Buckinghamshire *v.* Ward, a bill was brought for a specific performance of a lease relating to alum works, and the trade thereof, which would be greatly damaged, if the covenant was not performed on the part of Ward.

The covenants lay there in damages, and yet the court considered if they did not make such a decree an action afterwards would not answer the justice of the case, and therefore decreed a specific performance.

This is something of the like kind; the memorandum appears not to be the final contract, but is to be made complete by subsequent articles.

I am doubtful whether at law the plaintiff would not have been told this was an incomplete agreement.

Suppose two partners should enter into an agreement by such a memorandum as is in the present case, to carry on a trade together, and that it should be specified in the memorandum that articles should be drawn pursuant to it, and before they are drawn, one of the parties flies off, I should be of opinion, upon a bill brought by the other in this court, for a specific performance, that notwithstanding it is in relation to a chattel interest, yet a specific performance ought to be decreed.[1]

the ground of their being supplied by instalments; no such case can be produced at any late period: and, with the exception of Buxton *v.* Lister, the only case in which the doctrine as to a delivery by instalments has been recognized is that of Adderley *v.* Dixon, a totally different case."

There is a similar criticism by Sir Edward Fry in his treatise on Specific Performance (3d ed.), 39-40: "The case [Taylor *v.* Neville] appears to have been approved by his Lordship [Lord Hardwicke] but was doubted by Lord Hatherley (when V. C.), who remarked on the absence of any case for the sale of mere goods being supported on the ground of their being to be delivered by instalments. (Pollard *v.* Clayton, 1 K. & J. 462.) Mr. Austin, too, has expressed his inability to understand on what principle the case proceeded (Jurisprudence, 808), and a like inability is here confessed."

The remark of Jessel, M. R., in Fothergill *v.* Rowland, 17 Eq. 132, 140, should be added: "To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years, is to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practise on what is called the other side of Westminster Hall. There is never considered to be any difficulty in ascertaining such a thing." — Ed.

[1] Because of its obvious futility a decree for specific performance of an agreement for a partnership at will is never made. Hercy *v.* Birch, 9 Ves. 357; Sheffield Co. *v.* Harrison, 17 Beav. 294; New Br. Co. *v.* Muggeridge, 4 Drew. 686, 698.

Nor, as a rule, will equity compel the performance of an agreement for a partnership for a fixed term. Scott *v.* Rayment, 7 Eq. 112; Sichel *v.* Mosenthal, 30 Beav. 371; Hyer *v.* Richmond Co., 168 U. S. 471, 482, 484; Meason *v.* Kaine, 63 Pa. 335, 341; Reed *v.* Vidal, 5 Rich. Eq. 289. But in England *v.* Curling, 8 Beav. 129, a partnership having continued for

On the circumstances of the present case, such a bill ought to be entertained, but at the same time I will add that courts ought to weigh with great nicety cases of this kind before they determine the bill proper, where it is a mere personal chattel.

Secondly, If the plaintiff on the merits of the case is entitled to a decree.[1]

GEORGE B. ADAMS *v.* WILLIAM T. MESSINGER.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 19, 1888.

[147 *Massachusetts Reports*, 185.]

THE bill prayed specific performance of an agreement to furnish a certain number of working steam injectors made under and according to letters patent issued to defendant in the Dominion of Canada, to apply for letters patent in Canada for all subsequent improvements patented in the United States, and to assign the same to the plaintiff. Demurrer.[2]

W. ALLEN, J., sustained the demurrer; and the plaintiff appealed to the full court.

C. S. Knowles, for the defendant.

W. B. Durant, for the plaintiff.

DEVENS, J. It is the contention of the defendant, that the plaintiff has a full, complete, and adequate remedy at common law by an action for damages, and that the court sitting in equity cannot grant the relief sought by the prayer of the bill.

The controversy arises from the failure to perform an executory written contract. So far as this relates to personal property, the objections arising from the statute of frauds, which have sometimes been found to exist when oral contracts were sought to be enforced, have of course no application. The general rule that contracts as to the purchase of personal property are not specifically enforced, as are those which relate to real property, does not rest on the ground of any distinction between the two classes of property other than that which arises from their character.

Contracts which relate to real property can necessarily be satisfied

several years, one of the partners was restrained by injunction from carrying on the same business with any other persons than his copartners until the end of the partnership term, and a decree was made for the execution of the deed of partnership originally contemplated but not executed. See, also, Anon., 1 Mad. Ch. (3d ed.) 525, n. (*l*); Hibbert *v.* Hibbert, Coll. Part. 133; Wadsworth *v.* Manning, 4 Md. 59, 69.

A bill to compel the acceptance of shares in a joint-stock company was allowed in New Brunswick Co. *v.* Muggeridge, 4 Drew. 686, Kindersley, V. C., declining to follow Sheffield Co. *v.* Harrison, 17 Beav. 294. But in Strasburg Co. *v.* Echternacht, 21 Pa. 220, the court would not decree the acceptance of shares at the suit of the company. — ED.

[1] Lord Hardwicke finally dismissed the bill because of the plaintiff's improper conduct in procuring the contract. His judgment on this part of the case is omitted. — ED.

[2] The statement of the case is much condensed. — ED.

only by a conveyance of the particular estate or parcel contracted for, while those which relate to personal property are often fully satisfied by damages which enable the party injured to obtain elsewhere in the market property precisely similar to that which he had agreed to purchase. The distinction between real and personal property is entirely subordinate to the question whether an adequate remedy can thus be afforded. If, from the nature of the personal property, it cannot, a court of equity will entertain jurisdiction to enforce the contract. Story, Eq. Jur. § 717; Clark *v.* Flint.[1] A contract for bank, railway, or other corporation stock freely sold in the market, might not be thus enforced, but it would be otherwise where the stock was limited in amount, held in a few hands, and not ordinarily to be obtained. White *v.* Schuyler;[2] Treasurer *v.* Commercial Mining Co.;[3] Poole *v.* Middleton;[4] Doloret *v.* Rothschild.[5] See Chaffee *v.* Middlesex Railroad.[6]

Where articles of personal property are also peculiar and individual in their character, or have an especial value on account of the associations connected with them, as pictures, curiosities, family furniture, or heirlooms, specific performance of a contract in relation to them will be decreed. Lloyd *v.* Loaring;[7] Fells *v.* Read;[8] Lowther *v.* Lowther;[9] Williams *v.* Howard.[10] An agreement to assign a patent will be specifically enforced. Binney *v.* Annan.[11] Nor do we perceive any reason why an agreement to furnish articles which the vendor alone can supply, either because their manufacture is guarded by a patent or for any similar reason, should not also be thus enforced. Hapgood *v.* Rosenstock.[12] As the value of a patent right cannot be ascertained by computation, so it is impossible with any approach to accuracy to ascertain how much a vendee would suffer from not being able to obtain such articles for use in his business.

The contract of the defendant was twofold, to furnish and deliver certain described working steam injectors within a specified time to the plaintiff, and also that, if the defendant shall make improvements in injectors for steam boilers, and shall take out patents therefor in the United States, he will apply for letters patent in Canada, and on obtaining them will assign and convey the same to the plaintiff, and that he will not do any act prejudicial to these letters patent of Canada or the monopoly thus secured.

It is said that the court will not enforce a contract for personal services when such services require the exercise of peculiar skill, intellectual ability, and judgment, and therefore that the defendant cannot be ordered to make and deliver the injectors contracted for. But the principle on which it is held that a court of equity cannot decree one to perform a personal service involving peculiar talent or skill, because it cannot so mould its order and so supervise the individual executing it that it can determine whether he has honestly obeyed it or not, has no application here.

[1] 22 Pick. 231.
[2] 1 Abb. Pr. (N. S.) 300.
[3] 23 Cal. 390.
[4] 29 Beav. 646.
[5] 1 Sim. & Stu. 590.
[6] 146 Mass. 224.
[7] 6 Ves. 773.
[8] 3 Ves. Jr. 70.
[9] 13 Ves. 95.
[10] 3 Murphey, 74.
[11] 107 Mass. 94.
[12] 23 Fed. R. 86

The defendant has agreed to furnish and deliver certain injectors, which the contract shows to be patented articles. It does not appear from the bill that they were yet to be made when the contract was executed. But if it be assumed that they were, there is nothing from which it can be inferred that any skill peculiar to the defendant was required to construct them. For aught that appears, they could be made by any intelligent artificer in the metals of which they are composed. The details of their manufacture are given by reference to the patents which are referred to in the agreement, so that no difficulty such as has sometimes been experienced could have been found in describing accurately, and even minutely, the articles to be furnished. Nor are there found in the case at bar any continuous duties to be done, or work to be performed, requiring any permanent supervision, which, as it could not be concluded within a definite and reasonable time, has sometimes been held an obstacle to the enforcement of a contract by the court.

Agreements to make an archway under a railway, or to construct a siding at a particular point for the convenience of the landowner, have been ordered to be specifically enforced. Although the party aggrieved might have obtained damages which would have been sufficient to have enabled him to pay for constructing them, and although the work to be done necessarily involved engineering skill as well as labor, he was not bound to assume the responsibility or the labor of doing that which the defendant had agreed to do. Storer *v.* Great Western Railway;[1] Greene *v.* West Cheshire Railway.[2] The case at bar is readily distinguishable from that of Wollensak *v.* Briggs,[3] on which the defendant much relies. In that case, the defendant was to construct for the plaintiff certain improved machinery for a particular purpose, but no details were given as to the form, structure, principle, or mode of operating the proposed machine. It was obviously a contract too indefinite to enable the court to order its specific enforcement.

It is urged that specific performance of a part only of a contract will not be ordered when it is not in the power of the court to order the enforcement of the whole, and that it would not be possible to enforce that portion of the contract which relates to the application for letters patent in Canada, and the subsequent assignment of them. But where two parts of a contract are distinctly separable, as in the case at bar, there is no reason why one should not be enforced specifically, and the plaintiff compensated in damages for the breach of the other.

When a contract relates to but a single subject, and it is impossible for the defendant to perform it, except partially, the plaintiff is entitled to the benefit of such partial performance, and to compensation, if it be possible to compute what is just, so far as it is unperformed. It was therefore held in Davis *v.* Parker,[4] that where one had agreed to convey land with release of dower, and was unable to procure a release of dower, the purchaser was entitled to a conveyance without such release, with an abatement from the purchase money of the value of

[1] 2 Yo. & Col. Ch. 48. [2] L. R. 13 Eq. 44. [3] 20 Bradw. (Ill.) 50. [4] 14 Allen, 94.

the wife's interest at the time of the conveyance. See, also, Milkman *v.* Ordway ;[1] Curran *v.* Holyoke Water Power Co.[2]

We have assumed, in favor of the defendant's contention, that the only relief that the plaintiff could obtain for the breach of that portion of the agreement which relates to the application for a patent in Canada, for the improvements which the defendant had made, would be in damages. We have not intended thus to decide. That equity, by virtue of its control over the persons before the court, takes cognizance of many things which they may do or be able to do abroad, while they are themselves personally here, will not be controverted. One may be enjoined from prosecuting a suit abroad. He may be compelled to convey land situated abroad, although the conveyance must be according to the laws of the foreign country, and must be sent there for record. Pingree *v.* Coffin ;[3] Dehon *v.* Foster ;[4] Cunningham *v.* Butler ;[5] Newton *v.* Bronson ;[6] Bailey *v.* Ryder.[7]

There is nothing to show that the defendant, in making his application in Canada for the patent, is compelled to leave the State, any more than he would be compelled to do so if he was an applicant at Washington. The grant of such a patent is an act of administration only. If it were to be granted here, the party would be ordered to make application. It was held in Runstetler *v.* Atkinson,[8] that where a formal assignment of an invention had not been made, but a valid agreement had been made to assign, equity would order the party to make the formal assignment, and also to make application for the patent which, in such case, would issue to the assignee. The laws of Canada, which we can know only as facts, are not before us by any allegations as to them. If all that is required by them is a formal application in writing by the inventor, there would seem to be, from the allegations of the bill, sufficient reason why the defendant should be required to make and forward it, or place it in the hands of the plaintiff to be forwarded to the Canadian authorities.

In any event, as the application is preliminary only to obtaining letters patent for the purpose of assigning them to the plaintiff, the averments of the bill taken in connection with the terms of the agreement set forth a good reason why the plaintiff may ask an assignment of his title to the improvements in question from the defendant, so far as the Dominion of Canada is concerned, and also why the defendant should be restrained from alienating or in any way incumbering any right he may have to letters patent from Canada, if the plaintiff should decide to seek his remedy in this form, rather than in damages for breach of this part of the contract.

Demurrer overruled.[9]

1 106 Mass. 232, 253. 2 116 Mass. 90. 3 12 Gray, 288.
4 4 Allen, 545. 5 142 Mass. 47. 6 13 N. Y. 587.
7 10 N. Y. 363. 8 MacArthur & Mackey, 282.

9 Specific performance was decreed in the following cases: Equitable Co. *v.* Baltimore Co., 63 Md. 285 (agreement by defendant to sell all the coal-tar from its gas-works, which was indispensable to the plaintiff's business and not otherwise obtainable except from a great

CUD *v.* RUTTER.

In Chancery, before Lord Macclesfield, C., Michaelmas Term, 1719.

[1 Peere Williams, 570.[1]]

The defendant, in consideration of two guineas paid down, did by note under hand agree to transfer £1000 South-Sea stock at a fixed price at the end of three weeks; the plaintiff on the day demanded the stock, and offered to pay the price; but on the defendant's insisting that he would only pay the difference, and not transfer the stock, the plaintiff brings this bill for a specific performance, and to have the stock assigned.

Sir Joseph Jekyll, M. R., decreed in favor of the plaintiff.[2]

But afterwards, on an appeal, the Lord Chancellor Parker reversed this decree, delivering his opinion with great clearness, that a court of equity ought not to execute any of these contracts, but to leave them to law, where the party is to recover damages, and with the money may if he pleases buy the quantity of stock agreed to be transferred to him; for there can be no difference between one man's stock and another's. It is true, one parcel of land may vary from, and be more commodious, pleasant, or convenient than another parcel of land, but £1000 South-Sea stock, whether it be A, B, C, or D's, is the same thing, and in no sort variant; and therefore let the plaintiff, if he has a right, recover in damages, with which, when received, he may buy the stock himself.[3]

distance); Gloucester Co. *v.* Russia Co., 154 Mass. 92 (agreement to furnish a certain proportion of fish skins whose supply was limited and within the control of the defendant).

In Stuart *v.* Pennis, 91 Va. 688, an agreement for the sale of all trees of certain kinds growing on certain lands was enforced on three grounds: (1) that trees were a part of the realty, (2) that the contract was an instalment contract, (3) that the buyer was not allowed to mark the trees in advance. But see, *contra*, Paddock *v.* Davenport, 107 N. Ca. 710. — Ed.

[1] 5 Vin. Ab. 538, pl. 21, s. c.

[2] The judgment of the master of the rolls and the argument of defendant are omitted. — Ed.

[3] Cappur *v.* Harris, Bunb. 135; Nutbrown *v.* Thornton, 10 Ves. 159, 161; Mason *v.* Armitage, 13 Ves. 25, 37; Frue *v.* Houghton, 6 Colo. 318, 320; Diamond Co. *v.* Todd, 6 Del. Ch. 163, 179; Paddock *v.* Davenport, 107 N. C. 710, 717; Goodwin's App., 117 Pa. 514, 534 *Accord*. In Nutbrown *v.* Thornton, *supra*, Lord Eldon said: "It is now perfectly settled that this court will not enforce the specific performance of an agreement for a transfer of stock." — Ed.

DUNCUFT *v.* ALBRECHT.

IN CHANCERY, before SIR L. SHADWELL, V. C., JUNE 9, 1841.

[12 Simons, 189.]

THE VICE-CHANCELLOR. The bill set forth a valid bilateral agreement for the sale by the defendant to the plaintiff of fifty shares of the London and Southampton Railway Co., alleged a breach, and prayed that the defendant might be decreed specifically to perform the said agreement.

The defendant demurred to the bill.[1]

Then the only question is whether there has been any decision from whence you can extract a conclusion that the court will not decree a specific performance of an agreement for the sale of such shares? Now I agree that it has been long since decided that you cannot have a bill for the specific performance of an agreement to transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of 3 per cents. or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description; which railway shares are limited in number, and which, as has been observed, are not always to be had in the market. And, as no decision has been produced to the contrary, my opinion is that they are a subject with respect to which an agreement may be made which this court will enforce.[2]

[1] The statements of the bill have been condensed, and the argument for the defendant and a portion of the judgment are omitted. — ED.

[2] Gardener *v.* Pullen, 2 Vern. 393 (E. I. Co.); Colt *v.* Netterville. 2 P. Wms. 304 (York Building stock; but see, *contra*, Dorison *v.* Westbrook, 5 Vin. Ab. 540, pl. 22); Shaw *v.* Fisher, 2 DeG. & Sm. 11, 5 D. M. & G. 596 (railway shares); Cheale *v.* Kenwood, 3 DeG. & J. 27; Poole *v.* Middleton, 29 Beav. 646 (Patent Fuel Co.); Hawkins *v.* Maltby, 3 Ch. 188, 4 Ch. 100 (Imperial Mercantile Credit Co.); Paine *v.* Hutchinson, 3 Ch. 388 (Contract Corporation, Limited); Moses *v.* Scott, 84 Ala. 608, 611 (*semble*); Leach *v.* Fobes, 11 Gray, 506, 510 (*semble*); Todd *v.* Taft, 7 All. 371 (*semble*); Somerby *v.* Buntin, 118 Mass. 279, 287 (*semble*); Holmes *v* Winchester, 133 Mass. 140. But see Adams *v.* Messinger, *supra*, 50.

Generally, in this country, specific performance of an agreement for the transfer of shares in a corporation will be decreed, if the shares are not readily obtainable in the market, but not otherwise. Hyer *v.* Richmond, 168 U. S. 471, 488 (*semble*); Ross *v.* Union Co., 1 Wool. 26; Treasurer *v.* Commercial Co., 23 Cal. 390; Krouse *v.* Woodward, 110 Cal. 638; Frue *v.* Houghton, 6 Colo. 318; Cowles *v.* Whitman, 10 Conn. 121, 124; Diamond Co. *v.* Todd, 6 Del. Ch. 163, 180; Adams *v.* Messinger, *supra*, 50; New England Co. *v.* Abbott, 162 Mass. 148, 154; Cushman *v.* Thayer Co., 76 N. Y. 365, 369, 370; Johnson *v.* Brooks, 93 N. Y. 337, 343; White *v.* Schuyler, 1 Abb. Pr. N. S. 300; Ashe *v.* Johnson, 2 Jones, Eq. 149; Northern Co. *v.* Walworth, 193 Pa. 207 (explaining Foll's App., 91 Pa. 434); Manton *v.* Ray, 18 R. I. 672; Bumgardner *v.* Leavitt, 35 W. Va. 194; Avery *v.* Ryan, 74 Wis. 591, 596.

In a few States specific performance is not compelled even though the shares are not to be had in open market. Pierce *v.* Plumb, 74 Ill. 326; Barton *v.* DeWolf, 108 Ill. 195; Ferguson *v.* Paschall, 11 Mo. 267, 270 (*semble*); Eckstein *v.* Downing, 64 N. H. 248 (because the buyer presumably did not care for the shares in specie, but only for their money value).

Right of preëmption of a partner's share. — An agreement that a partner shall offer his

COGENT *v.* GIBSON.

IN CHANCERY, BEFORE SIR J. ROMILLY, M. R., MAY 30, 1864.

[33 *Beavan*, 557.]

THE plaintiff Cogent was entitled to a French patent for improvements in the manufacture of saddles. In 1863 the defendant agreed to purchase from the plaintiff the patent right to manufacture and sell these saddles in England for 125*l.*, and Cogent was, at the expense of the defendant, to obtain the English patent.

The patent was obtained, and this was a bill by the vendor against the purchaser for the specific performance of the agreement.

Mr. Selwyn and *Mr. C. H. Blake*, for the plaintiff.

Mr. T. H. Terrell, for the defendant, argued that this was not a proper case for the interference of this court, for all the plaintiff required was the purchase-money, which he might obtain by action at law. He argued, secondly, that the patent right was of no value.

THE MASTER OF THE ROLLS. I think the plaintiff is entitled to a decree for specific performance.

I am of opinion, that in all these cases the rights of the vendor and purchaser are mutual and correlative. I had to consider the point lately, in a case where the plaintiff, the vendor of land at Harrogate, had nothing to do but to receive a sum of money, and I held that he could come to this court for specific performance.[1]

share to his copartners before transferring it to a stranger will be enforced specifically in equity. Homfray *v.* Fothergill, 1 Eq. 567. — ED.

[1] Lewis *v.* Lechmere, 10 Mod. 503; Kenney *v.* Wexham, 6 Mod. 355; Clifford *v.* Turrill, 1 Y. & C. C. C. 138, 150; Walker *v.* Eastern Co., 6 Hare, 594; Hope *v.* Walter, 1899, 1 Ch. 879; Cathcart *v.* Robinson, 5 Pet. 263, 278; Raymond *v.* San Gabriel Co., 53 Fed. R. 883; Greenfield *v.* Carlton, 30 Ark. 547; Hodges *v.* Kowing, 58 Conn. 12; Forsyth *v.* McCauley, 48 Ga. 402; Jackson *v.* Nicolson, 70 Ga. 198; Tompkins *v.* Cooper, 97 Ga. 671; Andrews *v.* Sullivan, 7 Ill. 327; Burger *v.* Potter, 32 Ill. 66; Robinson *v.* Appleton, 124 Ill. 276; Mineral Co. *v.* DeBautte, 50 La. An. 1281; Maryland Co. *v.* Kuper, 90 Md. 529; Old Colony Co. *v.* Evans, 6 Gray, 25; Conley *v.* Finn, 171 Mass. 70; Chauncey *v.* Leominster, 172 Mass. 340; Loveridge *v.* Shurtz, 111 Mich. 618; Abbott *v.* Moldestad, 74 Minn. 293; Memphis Co. *v.* Scruggs, 50 Miss. 284; Paris *v.* Haley, 61 Mo. 453; Davey *v.* Dakota County, 19 Neb. 721; Hendrix *v.* Barker, 49 Neb. 369; Kloke *v.* Gardels, 52 Neb. 117; Hopper *v.* Hopper, 16 N. J. Eq. 147; Hart *v.* Rich 59 N. J. Eq. 492, 45 A. R. 969; Moore *v.* Baker (N. J. Eq. 1901), 49 A. R. 836; Brown *v.* Haff, 5 Paige, 235; State *v.* Sheridan, Clarke, Ch. 533; Crary *v.* Smith, 2 N. Y. 60; Rindge *v.* Baker, 57 N. Y. 209, 219 (*semble*); Baumann *v.* Pinckney, 118 N. Y. 604, 612; Phillips *v.* Berger, 2 Barb. 608, 8 Barb. 527; Kullman *v.* Cox, 42 N. Y. Ap. Div. 620; White *v.* Hooper, 6 Jones, Eq. 152; Springs *v.* Sanders, Phill. Eq 67; Farley *v.* Palmer, 20 Oh. St. 223; Wade *v.* Greenwood, 2 Rob. Va. 474; Gates *v.* Parmly, 93 Wis. 294 *Accord*.

Porter *v.* Frenchmen's Co., 84 Me. 195; Eckstein *v.* Downing, 64 N. H. 248; Kauffman's Ap., 55 Pa. 383; Dech's Ap., 57 Pa. 467; Smaltz's Ap., 99 Pa. 311 *Contra*.

In Massachusetts, if the plaintiff is entitled to recover the same amount of money at law as he would receive in equity, *e. g.*, an instalment due before the time for conveyance, he cannot sue in equity. Jones *v.* Newhall, 115 Mass. 244.

In Lewis *v.* Lechmere, *supra*, appears the following:—

"It was said by the counsel for the defendant, that though in case of articles entered into for the purchase of lands, the vendee may undoubtedly exhibit his bill in equity for

It is true that the vendor may bring an action to recover the damages, but he is also entitled to come here for a specific performance.

I am of opinion, that where there is a valid contract for the sale of a patent, this court will specifically enforce it in a suit by the purchaser against the vendor, and will make the latter execute a conveyance.[1] I am also of opinion that the opposite is equally true, and that the vendor may come into equity for the purchase-money.

The plaintiff is entitled to the usual decree for specific performance.

WITHY *v.* COTTLE.

In Chancery, before Sir John Leach, V. C., January 31, 1823.

[1 *Simons and Stuart*, 174.]

This was a bill filed by the vendor of an annuity, payable out of the dividends of stock, standing in the name of the accountant-general of this court, for the specific performance of an agreement for the purchase of this annuity.

The defendant demurred to the bill.

Mr. Hart and *Mr. Stuart* for the demurrer.[2]

Mr. Sugden and *Mr. Seton*, for the Bill, were stopped by the court.

The Vice-Chancellor. There can be no doubt that the defendant, who is the purchaser of this annuity, might have filed a bill for the specific performance of the agreement for sale to him; because

the specific performance of these articles; yet it might admit of a doubt whether the vendor might do the same. . . .

"But to this it was answered, that upon mutual articles there ought to be mutual remedies: that if the vendee had a remedy both in law and equity, the vendor would not be upon a par with him, unless he had so too: that the remedy the vendor had at law was not a remedy adequate to what he had in this court; for at law they only could give him the difference in damages, whereas he might for particular reasons stand in need of the whole sum. Besides, by the articles the land is bound, and the vendor is in nature of a trustee for the vendee; and whether a recovery in an action of law upon the articles may make him cease to be so, is not entirely clear.

"The Lord Chancellor [Parker] was of opinion, that the remedy the vendor had at law upon the articles was not adequate to that of a bill in equity for a specific performance." — Ed.

[1] Printing Co. *v.* Sampson, 19 Eq. 462 (agreement to assign future patents); Nesmith *v.* Calvert, 1 Wood. & M. 34; Newell *v.* West, 13 Blatchf. 114, 116; Hapgood *v.* Rosenstock, 23 Fed. R. 86; N. Y. Co. *v.* Union Co., 32 Fed. R. 783; Hull *v.* Pitrat, 45 Fed. R. 94; Blackmer *v.* Stone, 51 Ark. 489; Corbin *v.* Tracy, 34 Conn. 325; Satterthwait *v.* Marshall, 4 Del. Ch. 337; Runsteker *v.* Atkinson, 4 McArth. 382 (agreement to assign future inventions); Whitney *v.* Burr, 115 Ill. 289; Searle *v.* Hill, 73 Iowa, 367; Binney *v.* Annan, 107 Mass. 94; Somerby *v.* Buntin, 118 Mass. 279, 287; Adams *v.* Messinger, 147 Mass. 185; Domestic Co. *v.* Metropolitan Co., 39 N. J. Eq. 160 (agreement to grant license to use patent); Spears *v.* Willis, 151 N. Y. 443; Paddock *v.* Davenport, 107 N. Ca. 710, 717; Reese's Ap., 122 Pa. 392; Hepworth *v.* Henshall, 153 Pa. 592; Fuller *v.* Bartlett, 68 Wis. 73; Valley Co. *v.* Goodrick, 103 Wis. 436 *Accord*.

Copyright. — The rule is the same as to copyrights. Thombleson *v.* Black, 1 Jur. 198; Sweet *v.* Cater, 11 Sim. 572; Sims *v.* Marryat, 17 Q. B. 281. — Ed.

[2] The argument for the defendant is omitted. — Ed.

a court of law could not give him the subject of his contract, and the remedy here must be mutual for purchaser and vendor.

Demurrer overruled.[1]

ADDERLEY *v.* DIXON.

IN CHANCERY, BEFORE SIR J. LEACH, V. C., FEBRUARY 23, 1824.

2 L. J. Chanc. 203.

[1 *Simons & Stuart*, 607.]

THE plaintiffs having purchased and taken assignments of certain debts which had been proved under two commissions of bankrupt, agreed to sell them to the defendant for 2*s.* 6*d.* in the pound.

The defendant's solicitor, accordingly, gave notice of the sale to the assignees, and prepared an assignment of the debts, and the plaintiffs, notwithstanding the purchase-money had not been paid, executed it, and signed the receipt for the consideration money, and left it in the solicitor's hands. The bill was filed to compel the defendant specifically to perform the agreement, and to pay the purchase-money to the plaintiffs.

The defendant, by his answer, submitted that the matter of the agreement was not the proper subject of a bill in equity for a specific performance; and claimed the same benefit as if he had demurred to the bill.[2]

THE VICE-CHANCELLOR. Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus a court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a court of equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods.

In Taylor *v.* Neville, cited in Buxton *v.* Lister, specific performance was decreed of a contract for sale of 800 tons of iron, to be delivered and paid for in a certain number of years and by instalments; and the reason given by Lord Hardwicke is that such sort of contracts differ from those that are immediately to be executed, and they do differ in this respect, that the profit upon the contract, being

[1] Kenney *v.* Wexham, 6 Mad. 355; Pritchard *v.* Ovey, 1 Jac. & W. 396; Clifford *v* Turrill, 9 Jur. 633, 1 Y. & C. C. C. 138 *Accord.* — ED.

[2] The arguments of counsel are omitted. — ED.

to depend upon future events, cannot be correctly estimated in damages where the calculation must proceed upon conjecture. In such a case, to compel a party to accept damages for the non-performance of his contract, is to compel him to sell the actual profit which may arise from it, at a conjectural price. In Ball *v.* Coggs,[1] specific performance was decreed in the House of Lords of a contract to pay the plaintiff a certain annual sum for his life, and also a certain other sum for every hundred-weight of brass wire manufactured by the defendant during the life of the plaintiff. The same principle is to be applied to this case. Damages might be no complete remedy, being to be calculated merely by conjecture; and to compel the plaintiff in such a case to take damages would be to compel him to sell the annual provision during his life for which he had contracted, at a conjectural price. In Buxton *v.* Lister, Lord Hardwicke puts the case of a ship carpenter purchasing timber which was peculiarly convenient to him by reason of its vicinity; and also the case of an owner of land covered with timber contracting to sell his timber in order to clear his land; and assumes that as, in both those cases, damages would not, by reason of the special circumstances, be a complete remedy, equity would decree specific performance.

The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that, upon the principle established by the cases of Ball *v.* Coggs and Taylor *v.* Neville, a court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages would be to compel him to sell these dividends at a conjectural price.

It is true that the present bill is not filed by the purchaser, but by the vendor, who seeks, not the uncertain dividends, but the certain sum to be paid for them. It has, however, been settled, by repeated decision, that the remedy in equity must be mutual; and that, where a bill will lie for the purchaser, it will also lie for the vendor.[2]

W. H. TAYLOE *v.* MERCHANTS' FIRE INSURANCE CO.

SUPREME COURT, UNITED STATES, JANUARY TERM, 1850.

[9 *Howard*, 390.]

THIS was an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

1 1 Bro. P. C. 140.

2 Specific performance of a contract for the sale of a debt was enforced in Wright *v.* Bell, 5 Price, 9; Gottschalk *v.* Stein, 69 Md. 51; Cutting *v.* Dana, 25 N. J. Eq. 265; Phillips *v.* Berger, 2 Barb. 608.

See, also, Pollard *v.* Clayton, 1 K. & J. 462, 477. — ED.

The prayer of the bill was for the payment of the loss by fire of the plaintiff's dwelling-house, which occurred after the defendants had bound themselves to insure it, but before the issue of the contemplated policy.[1]

Nelson, J., delivered the opinion of the court.

III. It has also been objected that the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a court of equity; which may very well be admitted.

But it by no means follows from this that a court of chancery will not entertain jurisdiction. Had the suit been instituted before the loss occurred, the appropriate, if not the only, remedy would have been in that court, to enforce a specific performance, and compel the company to issue the policy. And this remedy is as appropriate after as before the loss, if not as essential, in order to facilitate the proceedings at law. No doubt, a count could have been framed upon the agreement to insure, so as to have maintained the action at law. But the proceedings would have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that court after the loss happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand.

Such relief was given in the case of Motteux *v.* The London Assurance Company,[2] and in Perkins *v.* The Washington Insurance Company.[3] See, also, Duer, 661, and 110, and 2 Phillips, 583.

As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And, no doubt, it was a strong sense of this injustice that led the court at an early day to establish the rule, that, having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in proceedings at law.

Decree reversed.[4]

[1] The statement of the case is abridged, and only so much of the opinion is given as relates to the right to relief in equity. — Ed.

[2] 1 Atk. 545.

[3] 4 Cow. 646.

[4] Mead *v.* Davison, 3 A. & E. 303, 308; Commercial Co. *v.* Union Co., 19 How. 318, 2 Curt. C. C. 524; Franklin Co. *v.* Colt, 20 Wall. 560, 567; Hebert *v.* Mut. Co., 12 Fed. R. 807; Security Co. *v.* Kentucky Co., 7 Bush, 81; Franklin Co. *v.* Taylor, 52 Miss. 441; Baile *v.* St. Joseph Co., 73 Mo. 371; Perkins *v.* Washington Co., 4 Cow. 645; Lightbody *v.* N. American Co., 23 Wend. 18, 25; Carpenter *v.* Mutual Co., 4 Sandf. Ch. 408; Ellis *v.* Albany Co., 50 N. Y. 401; Paddock *v.* Davenport, 107 N. Ca. 710, 717; Neville *v.* Merchants Co., 19 Oh. 452 (*semble*); Palm *v.* Medina Co., 20 Oh. 529; Wooddy *v.* Old Dominion Co., 31 Grat. 362; Haskin *v.* Agricultural Co., 78 Va. 700; Haden *v.* Farmers Co., 80 Va. 683 *Accord*.

Life insurance policy. — The rule is the same as to a life insurance policy. Hebert *v.*

HERMANN *v.* HODGES.

IN CHANCERY, BEFORE LORD SELBORNE, C., MAY 2, 1873.

[*Law Reports*, 16 *Equity*, 18.]

THIS was a suit for specific performance of an agreement (entered into on the occasion of an advance being made by the plaintiff to the defendant) to execute a mortgage "with an immediate power of sale."

Mr. Townsend, for the plaintiff, asked for a decree according to the form given in Seton on Decrees.[1] He referred to Ashton *v.* Corrigan,[2] in which a doubt was expressed by Vice-Chancellor Wickens whether the agreement was one of which the court would decree specific performance.

Mr. Northmore Lawrence, for the defendant, did not oppose.

LORD SELBORNE, L. C., said that he had no doubt of the propriety of making the decree asked for, unless the defendant was prepared to pay off the advance at once.[3]

ROGERS *v.* CHALLIS.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JULY 22, 1859.

[27 *Beavan*, 175.]

THE MASTER OF THE ROLLS.[4] I am clear that the court has no jurisdiction in this case.

Mutual Co., 12 Fed. R. 807; Hughes *v.* Piedmont Co., 55 Ga. 111; Ky. Co. *v.* Jenks, 5 Ind. 96.

But see, *contra*, Nestle *v.* Knickerbocker Co., 12 Phila. 477. — ED.

[1] Vol. i. p. 443.

[2] Law Rep. 13 Eq. 76.

[3] Sporle *v.* Whayman, 20 Beav. 607 (*semble*), (copyhold); Ashton *v.* Corrigan, 13 Eq. 76 (leaseholds); Taylor *v.* Eckersley, 2 Ch. D. 302 (*semble*), (chattels); Robinson *v.* Cathcart, 2 Cr. C. C. 590 (land); Shockley *v.* Davis, 17 Ga. 177 (*semble* — chattels); Alexander *v.* Ghiselin, 5 Gill, 138; Sullivan *v.* Tuck, 1 Md. Ch. 59; Triebert *v.* Burgess, 11 Md. 452 (chattels); Hicks *v.* Turck, 72 Mich. 311 (land); Irvine *v.* Armstrong, 31 Minn. 216 (land); Dean *v.* Anderson, 34 N. J. Eq. 496 (land); Rothholz *v.* Schwarz, 46 N. J. Eq. 477 (chattels); Hale *v.* Oneah-Bah, 49 N. Y. 626, 634 (chattels); De Pierres *v.* Thorn, 4 Bosw. 266 (land); Knott *v.* Manufacturing Co., 30 W. Va. 790 (*semble*); Jones *v.* Brewer, 1 New Br. Eq. 630 *Accord*. 1 Rus. & Mil. 391; 156 Mass. 167.

Roundtree *v.* McLain, Hempst. 245 (*semble*), (note); City Co. *v.* Olmsted, 33 Conn. 476 (shares of stock — decree might go against defendant if solvent, but not if insolvent); Johnson *v.* Hoover, 72 Ind. 395.

In Sporle *v.* Whayman, 20 Beav. 607, the execution of a formal mortgage was not decreed, because not contemplated by the parties, but the defendant was compelled to execute a memorandum of the terms of the deposit of certain title deeds. — ED.

Agreement to pledge chattels. It is generally held that an agreement for value to give a mortgage of specified chattels creates an equitable lien. This is a consequence of the right to specific performance of such an agreement. It is difficult to see why an agreement for value to give a pledge of specified chattels should not also create an equitable lien. It has that effect in England. Martin *v.* Reid, 11 C. B. N. S. 730. But there are several decisions in this country to the contrary. The cases on the effect of such agreements to mortgage or to pledge chattels are fully collected in Williston's Cases on Bankruptcy 338, n. 1. — ED.

[4] Only the judgment of the court is given — ED.

The case cannot be put higher than this: — that the defendant applies to the plaintiff for the loan of 1000*l.* upon a security which he specifies, and the plaintiff assents to the proposal, but on the next day the defendant says, "I have changed my mind, I do not require your 1000*l.* I can get it upon better terms elsewhere." Is that a case in which a person can come to this court for a specific performance, and say, "you, the defendant, are bound to let me advance the 1000*l.* to you, — it is true your circumstances may be altered, but you are bound to let me advance the money to you"? It is very justly said, that the Statute of Frauds does not apply to such a case; therefore, if the court has jurisdiction in such a case, any conversation may be made the subject of a suit for specific performance: thus if two friends are walking together, and one says, "will you lend me 100*l.*, at 5*l.* per cent. for a year upon good security," and the other says, "I will," that conversation might be made the subject of a suit for specific performance in this court, if on the next day one friend should say, "I do not want the money," or the other should say, "I will not lend it." Nothing would be more difficult and more dangerous than the task which this court would have to perform, if it were to investigate cases of that description. This is not an agreement to purchase or sell anything; it is not the case of a contract to buy a particular debt upon certain terms, or a contract for the purchase of a certain quantity of goods, to be paid for by instalments and in a particular manner, in which case the court has held that these were circumstances which took the transaction out of the rule of this court, that an ordinary contract for the sale or purchase of goods is not the proper subject of a suit for specific performance in this court. It is nothing more than this: — a proposal to borrow a certain sum of money, upon certain terms, for a certain time, which is accepted, and the borrower says two or three days afterwards, I do not want the money, and I have got it elsewhere, upon better terms. It certainly is new to me, that this court has ever entertained jurisdiction in a case where the only personal obligation created is, that one person says, if you will lend me the money I will repay it and give you good security, and the terms are settled between them. The court has said, that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said, that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, I have sustained a pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation, and a jury would easily assess the amount of the damage which the plaintiff has sustained. I express no opinion whether an action would, or would not, lie in such a case as this; but I am satisfied that before Sir Hugh Cairn's Act, this court would not have entertained jurisdiction in such cases. If I recollect right, there is a case in the books[1] which de-

[1] Flint v. Brandon, 8 Ves. 159.

cides that an agreement to fill up a gravel pit is not one of which this court will decree the specific performance. I apprehend it would have startled some of the judges of this court to hear that its jurisdiction in specific performance extended to the case of agreements to lend moneys. How could it be? The case of a contract for the purchase of stock in the funds, at a particular price, is a much stronger case; for the injury arising from its non-performance might be much greater and more uncertain than in the case of an agreement to borrow a sum of money on particular terms, nevertheless specific performance in a case of stock has repeatedly been refused.[1] It appears to me, therefore, to be contrary to every principle on which this court has acted, to say, that this is a case in which, independent of Sir Hugh Cairn's Act, this court has jurisdiction to decree a specific performance: always bearing in mind that the court grants specific performance only in cases where the remedy at law is inadequate and defective, and also the observations made by Lord Eldon,[2] that though the court exercises a discretion in cases of specific performance, yet that it is to be exercised according to fixed rules and principles, and not arbitrarily.

I am of opinion that the bill must be dismissed with costs.[3]

[1] Cud *v.* Rutter, 1 Peere W. 570; Nutbrown *v.* Thornton, 10 Ves. 161; Mason *v.* Armitage, 13 Ves. 37; Doreson *v.* Westbrook, 5 Vin. Ab. 540.

[2] White *v.* Damon, 7 Ves. 35.

[3] Western Co. *v.* West, 1892, 1 Ch. 271, 275; Conklin *v.* People's Ass'n, 41 N. J. Eq. 20 *Accord.*

Agreement to lend money. Equity will not decree performance of a contract to lend money. Sichel *v.* Mosenthal, 30 Beav. 371; Larios *v.* Bonany, L. R. 5 P. C. 346, 354; Western Co. *v.* West, 1892, 1 Ch. 271, 275; South African Territories *v.* Wallington, 1898, A. C. 309, 1897, 1 Q. B. 692; Conklin *v.* People's Ass'n, 41 N. J. Eq. 20; Bradford Co. *v.* New York Co., 123 N. Y. 316. — Ed.

COMES RANELAUGH *v.* HAYES.

In Chancery, before Lord Guilford, K., October 30, 1683.

[1 *Vernon*, 189.]

The Earl of Ranelaugh assigns several shares of the excise in Ireland to Sir James Hayes, and Sir James covenants to save the Earl harmless in respect of that assignment, and to stand in his place touching the payments to the King, and other matters, that were to have been performed by him. The plaintiff the Earl of Ranelaugh suggests in his bill, that he is sued by the King for 20,000*l.* and that the defendant Sir James Hayes by the agreement ought to have paid it; and therefore prays the defendant may be decreed to perform the agreement in specie.

It was insisted for the defendant, that here was no proper subject for equity, nor any thing that the court could decree; for here was no specific covenant, but only a general and personal covenant for indemnity; and that was not decreeable in equity; for it sounds only in damages, which cannot be ascertained in this court; especially as this case is, there being no breach of the covenant assigned in the bill; for a suit being brought by the King, that is not in itself any breach, for the defendant cannot prevent that. He will defend the suit, and if nothing is recovered, there is no breach.

But the Lord Keeper in this case thought fit to decree that Sir James should perform his covenants;[1] and directed it to a Master, and that *toties quoties* any breach should happen, he should report the same specially to the court; and the court then might, if there should be occasion, direct a trial at law in a *quantum damnificatus*:[2] and he conceived it reasonable, that Sir James Hayes should be decreed to clear the Earl of Ranelaugh from all those suits and incum-

[1] The right to specific performance of an agreement to indemnify the plaintiff was enforced or recognized in the following cases: Pember *v.* Mathews, 1 Bro. C. C. 52; London Co. *v.* Humphrey, 6 W. R. 784, 785 (*semble*); Anglo-Australian Co. *v.* British Society, 3 Giff. 521, 4 D., F. & J. 521; Reybold *v.* Herdman, 2 Del. Ch. 34; Chamberlain *v.* Blue, 6 Blackf. 491; Champion *v.* Brown, 6 Johns. Ch. 398.

But see *contra*, Hoy *v.* Hansborough, Freem. Ch. (Miss.) 533; Foote *v.* Garland, Sm. & M. Ch. 95.

That a surety may file a bill for exoneration against his principal or co-surety, and compel the one to pay the entire liability and the other to pay his contributive share to the creditor, is well settled. The authorities are collected in Ames, Cases on Suretyship, 597, n. 2, 598, n. 2. See especially Wolmershausen *v.* Gullick, 1893, 2 Ch. 514, Ames, Cases on Suretyship, 588 s. c.

Equity will compel performance of the analogous contract to exonerate the property of the plaintiff, *e. g.*, a contract to pay off a judgment or mortgage lien held by a third person. Reilley *v.* Roberts, 34 N. J. Eq. 299; Malins *v.* Brown, 4 N. Y. 403; Bennett *v.* Abrams, 41 Barb. 619; Weir *v.* Mundell, 3 Brewst. 594; Barkley *v.* Barkley, 14 Rich. Eq. 12. — Ed.

[2] The judgment of the Lord Keeper, providing in advance for possible future breaches, has been overruled. Lloyd *v.* Dimmack, 7 Ch. D. 398, 401; Hughes-Hallett *v.* Indian Co., 22 Ch. D. 561 — Ed.

brances within some reasonable time. And he compared it to the case of a counter-bond; where although the *surety* is not troubled or molested for the debt, yet at any time after the money becomes payable on the original bond, this court will decree the *principal* to discharge the debt; it being unreasonable that a man should always have such a cloud hang over him.

HALL *v.* HARDY.

In Chancery, before Sir J. Jekyll, M. R., 1733.

[3 *Peere Williams*, 187.]

Upon a bill brought to compel the defendant to make a specifick performance of an award, the case was thus: The plaintiff and defendant were brother and sister, between whom there was a dispute touching the fee-simple of a small parcel of land under their father's will; and the plaintiff and defendant entered into a bond in the penalty of 200*l.* to stand to the award of arbitrators touching this matter. The arbitrators made an award, that the plaintiff should pay 10*l.* to the defendant at such a day, and 30*l.* to the defendant at another day; and that thereupon the defendant should procure his wife to join with him in a fine and deed of uses, and thereby convey the premisses to the plaintiff and his heirs. The plaintiff paid the defendant the 10*l.* which the defendant accepted upon the day on which it was awarded to be paid; afterwards the plaintiff tendered the remaining 30*l.* on the day on which that was awarded to be paid, and the defendant was willing to take the money, but would not make the fine and deed of uses. Wherefore the plaintiff brought this bill to compel the defendant to a specific performance of the award.

Upon opening the cause, the Master of the Rolls said, he thought this a strange bill; for which he knew no precedent, and that the plaintiff must sue his bond.

Whereupon I urged, that the plaintiff had actually paid the 10*l.* according to the award, and the defendant accepted it, and thereby undertaken to perform the award; that if this suit were not to be allowed, the plaintiff would have no remedy to get back the money paid by her to the defendant; that in Norton *versus* Mansell,[1] the court

1 2 Vern. 24. [Before Lord Jeffreys, C., May, 1687. The plaintiff and defendant had submitted to an arbitration by bond, and an award was made, not binding by form of law, by which the plaintiff was to pay the defendant 900*l.* and to seal a release to the defendant; and the defendant was to assign several securities he had from the plaintiff. The plaintiff sold some lands to raise the 900*l.*, expecting the defendant would receive it, as he gave him intimation he would, and tendered him the 900*l.* and a release executed by the plaintiff; and though there was no other execution on the plaintiff's part of the award, and though the award was *extra-judicial*, and not good in strictness of law, yet the Lord Chancellor decreed it should be performed in *specie*.] — Ed.

decreed a specific performance of an award, though in that case it was not executed, and in strictness of law, void.

To which his Honor replied, that because the award was not good in law, therefore in the case cited there might be reason to decree a specific performance. However, the court desiring to know what the counsel for the defendant had to say, as to the defendant's having accepted part of the money; it was insisted on his behalf to be sufficient, that there was (unless in very particular circumstances) no instance of a bill being brought for a specific performance of an award. Besides, that this was an unreasonable award, (*viz.*) that the husband should procure his wife to join with him in a fine, which it might not be in his power to do; and therefore the court would not oblige him to it. Also the wife's joining ought to be free, and not by the compulsion of her husband; that the plaintiff had a plain, proper and natural remedy, which was, to sue the bond, whereon the penalty would be recovered; and even as to the money which had been paid, if the defendant would not perform the award by procuring his wife to join with him in a fine, the plaintiff might recover it back, as received to the plaintiff's use.

Master of the Rolls: There have been an hundred precedents, where, if the husband for a valuable consideration covenants, that the wife shall join with him in a fine, the court has decreed the husband to do it, for that he has undertaken it, and must lie by it, if he does not perform it.[1] The money paid in pursuance of the award cannot be said to have been paid by the plaintiff to the use of the plaintiff himself; and the precedent in Mr. Vernon shews, that this court has decreed a specific performance of an award, which is more especially reasonable in the present case, where the plaintiff has paid, and the defendant accepted part of the money awarded; for by this acceptance the defendant has undertaken to perform the award, has consented to it, and made it his own agreement for a valuable consideration, (viz.) the money paid him. Wherefore, take a decree for the defendant's performance of the award, upon the payment of the residue of the money awarded, and let him pay costs, it being a defence against conscience to take the money awarded, and yet refuse to perform his part of the award.[2]

[1] This extraordinary doctrine that equity will compel a husband to procure a conveyance by his wife, although supported by a few early decisions, — Berry *v.* Wade, Finch, 180; Barrington *v.* Horn, 2 Eq. Ab. 17, pl. 7; Winter *v.* D'Evreux, 3 P. Wms. 189, n.; Withers *v.* Pinchard, 7 Ves. 475 (cited); Morris *v.* Stephenson, 7 Ves. 474, — is overruled in England, and has always been repudiated in this country. Otread *v.* Round, 4 Vin. Ab. 202, pl. 4; Daniel *v.* Adams, Amb. 495 (*semble*); Emery *v.* Wase, 8 Ves. 505, 514–517, 5 Ves. 846, 848; Davis *v.* Jones, 1 B. & P. N. R. 267, 269; Howel *v.* George, 1 Mad. 1, 6; Martin *v.* Mitchell, 2 Jac. & W. 413, 425; Frederick *v.* Coxwell, 3 Y. & J. 514, 517; Barbour *v.* Hickey, 2 App. D. C. 207, 213; Weed *v.* Terry, 2 Doug. (Mich.) 344; Richmond *v.* Robinson, 12 Mich. 193; Peeler *v.* Levy, 26 N. J. Eq. 330; Martin *v.* Dwelly, 6 Wend. 9, 15; Clark *v.* Seirer, 7 Watts, 107; Fisher *v.* Worrall, 5 W. & S. 478, 486; Weller *v.* Weyand, 2 Grant (Pa.), 103, 105; Riesz's App., 73 Pa. 485. — Ed.

[2] In Wood *v.* Griffith, 1 Sw. 43, 54, Lord Eldon said: "That a bill will lie for the specific performance of an award is clear, because the award supposes an agreement between the parties, and contains no more than the terms of that agreement as ascertained by a

Note: These decrees may not have been usual, because awards are commonly to pay money; in which cases a bill in equity to compel a performance is improper;[1] but where the award is to do any thing in specie, as to convey an estate, etc., in such case, if the defendant has accepted the money awarded him in satisfaction of the conveyance, it is highly reasonable, that he should make the conveyance; the rather, for that if the plaintiff had sued the bond at law, the defendant would have been relievable by bill in equity against the penalty of the bond, upon a *quantum damnificatus*. So that such a decree, as in the principal case, prevents a suit in equity.

AGAR *v.* MACKLEW.

IN CHANCERY, BEFORE SIR JOHN LEACH, M. R., NOVEMBER 9, 1825.

[2 *Simons and Stuart*, 418.]

THE bill was filed by Sir E. F. Agar and others, underlessees of Parsloe's Club in St. James Street. The defendant was an assignee of the underlessors. By the terms of the underlease the plaintiffs had the option of purchasing the underlessors' term for such price as should be fixed by two appraisers to be chosen, the one by the plaintiffs and the other by the underlessors. It was further agreed that in case the two appraisers should differ about the value of the said term, the same should be referred to an umpire to be chosen by the two appraisers.

The plaintiffs wishing to exercise their option appointed one appraiser and requested the defendant to appoint the other; but the defendant refused so to do.

The bill, after setting forth the above facts, prayed that the defendant be directed to appoint an appraiser, or, if he refused, that it might be referred to the Master to ascertain the value, the plaintiffs offering to pay the value fixed by the two appraisers, the umpire, or the Master.

third person; and then the bill calls only for a specific performance of an agreement in another shape." This doctrine is generally accepted. Blackett *v.* Bates, 1 Ch. Ap. 117, 124; McNeil *v.* Magee, 5 Mas. 244 (*semble*); Tobey *v.* Bristol, 3 Story, 800, 823; Kirksey *v.* Fike, 27 Ala. 383; Jones *v.* Blalock, 31 Ala. 180; Whitney *v.* Stone, 23 Cal. 275; Story *v.* Norwich Co., 24 Conn. 94; Overly *v.* Thrasher, 47 Ga. 10; Somerville *v.* Trueman, 4 Har. & McH. 43; Jones *v.* Boston Corp., 4 Pick. 507, 6 Pick. 148; Hodges *v.* Saunders, 17 Pick. 470; Stearns *v.* First Parish, 21 Pick. 114 (*semble*); Penniman *v.* Rodman, 13 Met. 382; Caldwell *v.* Dickinson, 13 Gray, 365; Buys *v.* Eberhardt, 3 Mich. 524; Cook *v.* Vick, 3 Miss. 882; Memphis Co. *v.* Scruggs, 50 Miss. 284; Emans *v.* Emans, 14 N. J. Eq. 114; Bouck *v.* Wilber, 4 Johns. Ch. 405; Viele *v.* Troy Co., 21 Barb. 381; Maury *v.* Post, 55 Hun, 454; Thompson *v.* Deans, 6 Jones, Eq. 22; Davis *v.* Havard, 15 S. & R. 165, 171; Backus's App., 58 Pa. 186 (*semble*); Wood *v.* Shepherd, 2 Pat. & H. 442 (*semble*) *Accord.* — ED.

[1] Story *v.* Norwich Co., 24 Conn. 94; Turpin *v.* Banton, Hardin, 312; Bubier *v.* Bubier, 24 Me. 42; Howe *v.* Nickerson, 14 All. 400; Memphis *v.* Scruggs, 50 Miss. 284, 291; Davis *v.* Havard, 15 S. & R. 165, 171 *Accord.* — ED.

To this bill the defendant demurred.[1]

Mr. *Sugden* and Mr. *Bickersteth*, for the defendant: —

The court has no jurisdiction to compel that first step, without which there can be no sale; and it will never direct, by its decree, an act over the execution of which it has no control. Suppose the court were to decree that the defendant should name an arbitrator, how could it compel the execution of that decree? Or, even if an arbitrator were named, how could it compel that arbitrator to act? Could it compel the arbitrators to agree upon a price? It is the constant doctrine of the court never to interfere in cases where it cannot enforce the acts which it is called upon to direct.

Mr. *Hart* and Mr. *Hayter*, for the plaintiffs.

The Vice-Chancellor. I consider it to be quite settled that this court will not entertain a bill for the specific performance of an agreement to refer to arbitration;[2] nor will, in such case, substitute the Master for the arbitrators, which would be to bind the parties contrary to their agreement. The demurrer must be allowed.

HOLT *v.* HOLT.

In Chancery, before Lord Somers, K., 1694.

[1 *Equity Abridgment*, 274, *placitum* 11.[3]]

If the plaintiff's father, seised in fee of lands, articles to pay J. S. 1000*l.* to build an house on the premises, and dies before the house is built, the heir may compel the builder to build it, and the father's executor to pay for it. Decreed.[4]

[1] The statement of the case is abridged, and the greater part of the arguments is omitted. — Ed.

[2] Price *v.* Williams, 6 Ves. 818 (*cited*); Mitchell *v.* Harris, 2 Ves. Jr. 129, 132, 136; Street *v.* Rigby, 6 Ves. 815; Gourlay *v.* Somerset, 19 Ves. 429; South Wales Co. *v.* Wythes, 5 D. M. & G. 880, 887; Vickers *v.* Vickers, 4 Eq. 529, 535; Toby *v.* Bristol, 3 Story, 800; Tscheider *v.* Biddle, 4 Dill. 55, 60; Contee *v.* Dawson, 2 Bland, 264, 276; Pearl *v.* Harris, 121 Mass. 390; Noyes *v.* Marsh, 123 Mass. 286 (*semble*); Miles *v.* Schmidt, 168 Mass. 339; Biddle *v.* Ramsey, 52 Mo. 153, 158; Hug *v.* Van Burkleo, 58 Mo. 202, 203; Strohmaier *v.* Zeppenfeld, 3 Mo. Ap. 429, 432; Smith *v.* Boston Co., 36 N. H. 487 (*semble*); Greason *v.* Keteltas, 17 N. Y. 491, 496; Dunnell *v.* Keteltas, 16 Abb. Pr. 205, 211; Conner *v.* Drake, 1 Oh. St. 166 (*semble*); Lowe *v.* Brown, 22 Oh. St. 463 (*semble*); Grosvenor *v.* Flint, 20 R. I. 21, 24; Hopkins *v.* Gilman, 22 Wis. 476 *Accord.* — Ed.

[3] 2 Vern. 322 s. c. — Ed.

[4] In Tyrgelden *v.* Warham, (1467–1473) 2 Cal. Ch. liv., a bill was filed against one who had covenanted to build a house and had received substantially the full contract price, but had failed to build. Whether the plaintiff sought specific performance or repayment does not appear. There is a similar ambiguity in the casual remark of Lord Chancellor Stillington, in Y. B. 8 Ed. IV. 4–11, that a *subpœna* would lie against one who in breach of his parol promise failed to build a house. In 1708 Lord Cowper, in Allen *v.* Harding, 2 Eq. Ab. 17, pl. 6, decreed the performance of a curate's agreement to build a house upon the glebe land. In Pembroke *v.* Thorpe, (1740) 3 Sw. 437, 443, Lord Hardwicke compelled the building of a house, and in City of London *v.* Nash, (1747) 3 Atk. 512, 1 Ves. Sr. 12 s. c., said that upon a lessee's covenant to build "the plaintiffs are clearly entitled to come into this court

FLINT *v.* BRANDON.

IN CHANCERY, before SIR WILLIAM GRANT, M. R., February 17, 1803.

[8 *Vesey*, 159.]

THE bill prayed specific performance of the covenants in a lease wherein Samuel and Thomas Brandon covenanted to demise a piece of ground, called the Gravel Pits, to the plaintiff, to hold from the 29th of September, 1799, the day on which a previous lease of the premises to Thomas Clutton would expire, for the term of 21 years, and to deliver possession of the premises to the plaintiff on the said 29th of September, in the same state and condition in which Clutton had covenanted to leave and yield them up at the end of his term.

The answer stated that the plaintiff was in possession, and submitted that his remedy, if any existed, was at law.[1]

THE MASTER OF THE ROLLS. This court does not, I apprehend, profess to decree a specific performance of contracts of every description. It is only where the legal remedy is inadequate or defective, that it becomes necessary for courts of equity to interfere. In Erring-

for a specific performance, otherwise on a covenant to repair; for to build is one entire single thing, and if not done prevents that security which the City of London has for the rent, by virtue of the lease." To these authorities may be added the opinion of Lord Loughborough in Mosely *v.* Virgin, (1796) 3 Ves. Jr. 184: "It is commonly said, no such decree (for specific performance) can be made upon a covenant to repair; and Lord Thurlow appears to have added, that he did not see how it could be made upon a covenant to build, being equally uncertain. That certainly admits this qualification: if the transaction and agreement is in its nature defined, perhaps there would not be much difficulty to decree specific performance."

On the other hand, in Errington *v.* Aynesly, (1788) 2 Bro. C. C. 341, 1 Dick. 692 s. c., Sir Lloyd Kenyon, M. R., gave this *dictum:* "There is no case of a specific performance decreed of an agreement to build an house, because if A will not do it B may. A specific performance is only decreed where the party wants the thing in specie and cannot have it in any other way." Lord Thurlow in Lucas *v.* Commerford, (1790) 1 Ves. Jr. 235, 2 Bro. C. C. 166 s. c., referring to the similar case against a lessee before Lord Hardwicke, said: "I am not inclined to follow that precedent of building a house under the direction of the court any more than of repairing one." Lord Thurlow's opinion has so far prevailed that a lessee is not compelled to perform specifically a covenant to build upon the demised premises. Kay *v.* Johnson, 2 Hen. & M. 118. But see Cabot *v.* Smith, 10 Jur. N. S. 1123, 11 L. T. Rep. 298.

A fortiori performance of a contract for building a house or other construction upon land of the plaintiff by a defendant who is not a lessee will not be enforced specifically. Accordingly equitable relief has been refused in the case of contracts —

To build railway stations and bridges: Fallon *v.* R. R. Co., 1 Dill. 121.

To build a railroad: South Wales Co. *v.* Wythes, 5 D. M. & G. 880, 1 K. & J. 186; Greenhill *v.* Isle of Wight Co., 19 W. R. 345; Texas Co. *v.* Marshall, 136 U. S. 393, 407 (*semble*); Ross *v.* Union Co., 1 Woolw. 26; Oregonian Co. *v.* Oregon Co., 11 Sawy. 33; Strong *v.* Richmond Co., 101 Fed. R. 511; Danforth *v.* Phila. Co., 30 N. J. Eq. 12; Wharton *v.* Stoutenbergh, 35 N. J Eq. 266, 277. See Kansas Co. *v.* Topeka Co., 135 Mass. 34, 37, 38.

To erect and maintain telephonic apparatus: Keith *v.* Nat. Teleph. Co., 1894, 2 Ch. 147.

To repair a mill: Reed *v.* Vidal, 5 Rich. Eq. 289.

But in Hepburn *v.* Leather, 50 L. T. Rep. 660, the court decreed that the defendant should build a wall on the land of the plaintiff. — ED.

[1] The statement is condensed and the arguments are omitted. — ED.

ton *v.* Aynesley,[1] Lord Kenyon says, "a specific performance is only decreed, where the party wants the thing in specie; and cannot have it any other way." I will not say, courts of equity have in every instance confined themselves within this line: but this being the principle, I will not deviate from it farther than I am bound from deference to precedent and authority. In the present case complete justice can be done at law. The matter in controversy is nothing more than the sum it will cost to put the ground in the condition, in which by the covenant it ought to be. The plaintiff will be entitled to recover damages in an action for breach of the contract. In some respects the legal remedy is better than any this court can give; for the plaintiff recovering, and having the disposition of the money, may perform the work in such manner as he thinks proper: whereas, if a specific performance is decreed, a question may arise, whether the work is sufficiently performed. [The jury may also take into consideration any injury to him by not having performed at the commencement of the lease: but this Court can only decree a performance now.]

As to the cases upon building contracts, it is unnecessary to make observations upon them. If it is settled, that such contracts should be specifically performed, I should think myself bound to follow that course, without inquiring, whether it is strictly consonant to principle. But I am not barred from that inquiry, where a contract of another species is for the first time brought into this court for a specific performance. No instance of a specific performance of such a covenant as this has been produced. Therefore I am at liberty to do, what upon principle ought to be done, to dismiss this bill.[2]

F. W. BECK AND OTHERS, RESPONDENTS, *v.* M. ALLISON, APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, APRIL 21, 1874.

[56 *New York Reports*, 366.]

GROVER, J.[3] This action was brought by the plaintiffs as assignees of a lease made by the defendant of the premises known as 44 Vesey Street, in the city of New York, for two years, containing a provision for a renewal, at the option of the lessees, for a further term of three years, by giving the lessor notice as therein provided, which notice had been given as therein provided, for the specific performance of an agreement made by the lessor to repair damages caused by fire. The lease provided that all other repairs were to be made by the lessees,

[1] 2 Bro. C. C. 341.

[2] Approved in Storer *v.* Great Western Co., 2 Y. & C. C. C. 48, 53. — ED.

[3] Only a portion of the opinion of the court is given. — ED.

and the case shows that this agreement of the lessor was interlined after the preparation, but before the execution of the lease. The case shows that the premises were nearly destroyed by fire while in the occupation of the plaintiffs, under the lease, so as substantially to require rebuilding; but the trial judge found that they could be repaired, and the defendant must, after affirmance of the judgment by the General Term, be held in this court concluded by this finding. The judge further found that a reasonable time for doing the requisite repairs was four months.

The question is thus presented whether equity will enforce the specific performance of an agreement for making repairs of this character. The learned chief justice who gave the opinion of the General Term, after an elaborate and learned examination of the English authorities, arrived at the conclusion, that equity would specifically enforce agreements for making repairs. In this, he differs from Judge Story, who, after an examination and citation of some of the leading cases relied upon by the learned judge, adopts precisely an opposite conclusion. 1 Story's Equity, 726, §§ 726, 727. The accuracy of the conclusion of Judge Story is strongly corroborated by the fact, that in this State, and so far as I am aware, in this country, no court of equity has ever attempted the exercise of any such power. The same conclusion is substantially adopted by a learned English author of a work upon this particular branch of equity jurisprudence, who refers to most of the cases relied upon by the learned judge. Fry on Specific Performance, 19, § 48. I shall refer to only a few of the cases cited by the judge, although I have examined nearly all. City of London *v.* Nash,[1] decided by Lord Hardwick, is much relied upon in the opinion. In this case the chancellor stated that equity would enforce the performance of a building contract, for the reason that it was an entire thing, but not a contract for repairs. While I am unable to see if the former is thus enforced, why the latter should not be, for the reason that the former would be attended by about the same difficulties as the latter, and a legal remedy would be equally applicable to both, yet the case is authority against the conclusion of the General Term in the present case, as this is an agreement for making repairs. It may be further remarked, that a specific performance of the contract to rebuild was not decreed, the chancellor being of opinion that that would be inequitable under the circumstances, and the party injured by the breach of the contract was left to his legal remedy for the recovery of damages. The judgment given is no authority for enforcing the specific performance of contracts to build. In the subsequent case of Lucas *v.* Commerford,[2] it was expressly held by Chancellor Thurlow, that there could not be a decree to rebuild, as the court could no more undertake the conduct of a rebuilding than of a repair. I think the soundness of the reason given a full answer to the criticism of this chancellor contained in the opinion with a view to impair the author-

[1] 1 Vesey, 11; more fully reported, 3 Atkyns, 512.
[2] 3 Brown, 166.

ity of the judgment given in this case. In Rayner *v.* Stone,[1] a demurrer to a bill for the specific performance of covenants contained in a lease to repair hedges and the mansion house, was sustained by Lord Northington. Among the reasons assigned for the judgment, was, that the court had no officer to see to the performance, which the chancellor said was to him very strong. He asks how can a master judge of repairs in husbandry, etc. He adds that it is said that this is an equitable right, and that it was insisted that he should put the plaintiff in a better state than what he could be at law, but the court had no jurisdiction to strip the defendant of the right to try the supposed breach of covenant at law. Besides, how can a specific performance of things of this kind be decreed? The nature of the thing shows the absurdity of drawing these questions from their proper trial and jurisdiction. These reasons apply with all their force to an attempt to enforce the specific performance of the contract in question. The court must first adjudge what repairs are to be made and the time within which they are to be done. When this is accomplished more serious difficulties remain. The idea that the court can appoint a receiver to take possession of the property and cause the work to be done, with money furnished by the defendant, would be, in the language of Lord Northington, absurd. The mode, if undertaken, must be for the court first specifically to determine what shall be done, and when and how, and then to enforce performance by attachment, as for contempt in case of alleged disobedience. Then will arise, not only the question, whether there has been substantial performance, and if found not, whether the defendant had any such excuse therefor as will exonerate him from the contempt charged, and in case of performance, but not in as beneficial a manner as adjudged, the compensation that should be made for the deficiency. It is obvious that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult if not impracticable, while the remedy at law would, in nearly, if not in all cases, afford full redress for the injury. It is for these reasons that such powers have never been exercised in this country. It was for these reasons that the court in the South Wales R. Co. *v.* Whythe[2] refused to decree the specific performance of a contract to construct a branch railway. The case enforcing the specific performance of an agreement made by a railway company with a land owner, to construct an arch under their road for his use, does not militate against this doctrine. Damages in an action, at law, would not, in such a case, afford adequate redress. The same may be said of the case enforcing a contract for the construction of a wharf, etc. The want of an adequate remedy at law has always been regarded as a proper ground for sustaining a bill in equity. See Wilson *v.* Furness R. Co.[3] What was said by Lord Hardwick in Rook *v.* Worth[4] was intended to apply to the particular facts of that case, which related to questions as to the rights of ten-

1 2 Eden, 128.
2 5 DeG., McN. & Gord. 880
3 9 Equity Cases, 28.
4 1 Vesey Sr. 460.

ant in tail and the reversioner, which could not well be protected in a legal action.

But I do not deem it necessary further, to pursue the investigation. As I understand the English cases, the power of enforcing the specific performance of contracts for repairs is not now exercised by courts of equity there, and there is no authority for its exercise by the courts of this State. This being so, a court of equity had no jurisdiction, as such, of the action.[1]

The judgment appealed from must be reversed, and a new trial ordered. All concur.

Judgment reversed.

R. P. JONES *v.* J. S. PARKER AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY 29, 1895.

[163 *Massachusetts Reports*, 564.]

HOLMES, J.[2] The case of Jones *v.* Parker is a bill in equity brought by a lessee upon a lease purporting to begin on September 1, 1893, and to demise part of a basement in a building not yet erected. The lessor "covenants to deliver possession of the same to the lessee upon completion of said building, and thereafter, during the term of this lease, reasonably to heat and light the demised premises." It is alleged that the building has been completed, but that the defendants refuse to complete the premises with apparatus sufficient to heat and light the same, and to deliver the same to the plaintiff. It also is alleged that the occupancy of the premises for the purpose contemplated in the lease was impossible without the construction in the premises of proper apparatus for heating and lighting them before delivery to the plaintiff. The prayer is for specific performance of the covenant quoted, and for damages. The defendant demurs.

It does not need argument to show that the covenant is valid. Whether it should be enforced specifically admits of more doubt, the questions being whether it is certain enough for that purpose, Fry, Spec. Perf. (3d ed.) §§ 380–386, and whether a decree for specific performance would not call on the court to do more than it is in the habit of undertaking. Lucas *v.* Commerford,[3] Ross *v.* Union Pacific Rail-

[1] City of London *v.* Nash, 3 Atk. 512 *(semble)*; Rayner *v.* Stone, 2 Eden, 129; Whistler *v.* Mainwaring, 3 Wooddeson, Lect. 464, n. (z); Lucas *v.* Commerford, 3 Bro. C. C. 166, 1 Ves. Jr. 235, s. c.; Valloton *v.* Seignett, 2 Abb. Pr. 121 *Accord*.

Samuda *v.* Lawford, 8 Jur. N. S. 739, 6 L. T. Rep. 890 s. c. *Contra*.

By the Scotch law specific performance is decreed under circumstances like those in Beck *v.* Allison. Clark *v.* Glasgow Co., 1 MacQueen, 668. — ED.

[2] Only a portion of the opinion of the court is given. The court decided that the landlord, by the fair meaning of the covenant, was bound to have ready, at the time for delivery of possession of the premises, the machinery or apparatus necessary for the proper heating and lighting of the same. It was also decided that the assignment of the reversion by Parker did not defeat the plaintiff's right to specific performance. — ED.

[3] 3 Bro. Ch. 166, 167.

way.[1] We are of opinion that specific performance should be decreed. With regard to the want of certainty of the covenant, if the plaintiff were left to an action at law, a jury would have to determine whether what was done amounted to a reasonable heating and lighting. A judge sitting without a jury would find no difficulty in deciding the same question. We do not doubt that an expert would find it as easy to frame a scheme for doing the work. The other question is practical rather than a matter of precedent. It fairly is to be supposed, in the present case, that the difference between the plaintiff and the defendants is only with regard to the necessity of some more or less elaborate apparatus for light and heat, a difference which lies within a narrow compass and which can be adjusted by the court. There is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from the earliest days to the present time. Fry, Spec. Perf. (3d ed.) §§ 88, 98, 102, 103. Story, Eq. Jur. §§ 725–728. Y. B. 8 Ed. IV. pl. 11. Tyngelden *v.* Warham.[2]

Demurrer overruled.

LANE *v.* NEWDIGATE.

IN CHANCERY, BEFORE LORD ELDON, C., NOVEMBER 13, 1804.

[*Reported in* 10 *Vesey*, 192.]

THE plaintiff was assignee of a lease, granted by the defendant, for the purpose of erecting mills and other buildings; with covenants for the supply of water from canals and reservoirs on the defendant's estates, reserving to the defendant the right of working and using his then or future collieries, either with regard to the supply of water, or other uses of the collieries, or any locks for the passage of his boats or otherwise: the liberties and privileges granted being, as expressed in the lease, intended to be subordinate to the use and enjoyment of the collieries: the defendant to have due regard to the mills, and doing as little mischief as the nature of the case would admit.

The bill prayed, that the defendant may be decreed so to use and manage the waters of the canals as not to injure the plaintiff in the occupation of his manufactory; and, in particular, that he may be restrained from using the locks, and thereby drawing off the waters which would otherwise run to and supply the manufactory; and that he may be decreed to restore the cut for carrying the waste waters from the Arbury Canal to Kenilworth Pool, and to restore Kenilworth Stop-gate, and the banks of the canal to their former height; and also to repair such stop-gates, bridges, canals, and towing-paths as were made previously to granting the lease; and that he may be decreed to make compensation for the injury sustained by their

[1] Wool. 26, 43.

[2] 2 Cal. Ch. liv.

having been suffered to go out of repair; and that he may be decreed to remove the locks which have been made since the lease, and to make compensation for the injury sustained by the said locks having been made so near the manufactory, thereby injuring the machinery; and that he may be decreed to pay the plaintiff the expense he has been put to by working the steam engine to supply the want of water.

The LORD CHANCELLOR, upon the motion for the injunction, expressed a difficulty, whether it is according to the practice of the court to decree or order repairs to be done.

Mr. *Romilly*, in support of the injunction, said, the repairs to be done in this case are in effect nothing more than was done in Robinson *v.* Lord Byron,[1] viz., raising the damheads, so that the water shall not escape; as it will otherwise.

The LORD CHANCELLOR. So, as to restoring the stop-gate, the same difficulty occurs. The question is, whether the court can specifically order that to be restored. I think I can direct it in terms that will have that effect. The injunction, I shall order, will create the necessity of restoring the stop-gate; and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works.

The order pronounced was, that the defendant, his agents, &c., be restrained until farther order, from farther impeding, obstructing, or hindering the plaintiff from navigating the canal for the necessary purposes of the mill, or from using and enjoying the demised premises, and the mills and buildings erected thereon, or the liberties and privileges, granted by the indenture of lease, &c., contrary to the covenant, by continuing to keep the said canals, or the banks, gates, locks, or works of the same respectively, out of good repair, order, or condition; and also from farther troubling, molesting, and preventing the plaintiff, contrary to the covenant, in the use and enjoyment of the said mills and buildings, or the liberty, privilege, and power of drawing for the use of the said mill from the canals, &c., a sufficient quantity of water for the use and working of the said mill, by diverting, draining, or drawing off water: or preventing the same by the use of any lock or locks, erected by the defendant, from remaining and continuing in the said canals, or by continuing the removal of the stop-gate, mentioned in the pleadings in the action brought by the plaintiff, to have been erected; and by means of which the water could and would have been kept and retained in the said pool for the use of the mill; but nothing in this order is to extend, to diminish, lessen, hinder, or prejudice the working, using, or enjoying, by the defendant of his present and future collieries, either with regard to the supply of water for his fire engine, or other uses of the collieries, or of any locks to be erected for the passage of his boats, or otherwise; the defendant having due regard to the said mills, and doing as little damage thereto, as the nature of the case will admit.[2]

[1] 1 Bro. C. C. 588.

[2] Randall *v.* Latteran, 36 Conn. 48 *Accord.*

In Ryan *v.* Mutual Association, 1893, 1 Ch. 116, Lord Esher said, p. 124: "Then the

MAYOR, ALDERMEN, AND BURGESSES OF WOLVERHAMPTON *v.* EMMONS.

IN THE COURT OF APPEAL, FEBRUARY 1, 1901.

[*Law Reports*, [1901] 1 *King's Bench Division*, 515.]

A. L. SMITH, M. R.[1] This is an application by way of appeal from the judgment of Wills, J., who made an order against the defendant for specific performance of a building agreement under the following circumstances. The plaintiffs, who are the Corporation of Wolverhampton, were possessed of a piece of land abutting on a street in that borough, called Canal Street, upon which they were desirous of having new buildings erected for the improvement of the town, and also for the purpose of increasing the ratable value of the property. The defendant, who was desirous of engaging in a building speculation, purchased this piece of land, and in the conveyance by which it was conveyed to him he covenanted that he would commence to erect a building or buildings thereon, of a certain minimum height, within twelve calendar months from May 25, 1897, and would complete the same within two years from that date. The defendant not proceeding to erect buildings in accordance with his covenant, a correspondence took place between the parties, in the course of which the defendant was pressed by the plaintiffs to carry out his covenant, and he asked for, and from time to time obtained, further time, promising that he would proceed to do so. That correspondence was put in at the trial, and the conclusion arrived at, I think rightly, by Wills, J., with regard to its effect was that it resulted in a clear and definite agreement on the part of the defendant that, in consideration of his being allowed further time for the performance of his obligation in the matter, he would proceed to erect eight houses on the land purchased by him in accordance with plans submitted to and approved by the public works committee of the corporation, shewing the particulars of the houses to be erected. He failed to perform this agreement, and thereupon the plaintiffs brought their action for specific performance, claiming in the alternative damages. At the trial before my brother Wills, J., and a jury, the main claim of the plaintiffs throughout the case appears to have been for specific performance. I should think that it would have been hopeless to ask for specific performance if the case had rested solely upon the original covenant in the indenture of July 31, 1897; but, as I have said, the learned judge was of opinion, when he came to consider the question whether

judgment of Lord Eldon in Lane *v.* Newdigate was cited, in which that learned judge appears on that occasion to have deliberately held that the court ought to do indirectly that which it had no power to do directly. That is a doctrine that I, for one, must decline to follow." For a similar criticism by Sharswood, J., see Audenried *v.* Phila. Co., 68 Pa. 370, 377. — ED.

[1] Only the judgments of SMITH, M. R., and COLLINS, L. J., are given. — ED.

specific performance could be ordered, that, though the original covenant did not sufficiently specify the buildings to be erected, there was a subsequent agreement in substitution for that covenant, by which the defendant bound himself absolutely to erect certain houses, of which the details were sufficiently specified for the purposes of an order for specific performance; and he dealt with the case on the footing that the claim was for specific performance of that agreement. The jury being there, he directed them to assess the damages provisionally, in case, on consideration of the authorities, the contract should turn out to be one of which specific performance could not be ordered. The jury assessed the damages at 50*l.*, but ultimately the learned judge came to the conclusion that an order for specific performance should be made, and gave judgment accordingly. The question, therefore, is whether the case is one in which an order for specific performance can be made. The authorities to which reference has been made appear to me to shew that, where there is a definite contract, by which a person, who has acquired land in consideration thereof, has agreed to erect on the land so acquired a building, of which the particulars are clearly specified, and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages, that is a case in which, according to the doctrine acted upon by courts of equity in relation to such matters, specific performance ought to be ordered. If a man has contracted to build a house on a piece of land according to certain detailed plans, and has obtained a conveyance of the land on the terms that he will do so, why should he be allowed to turn round and refuse to perform that contract, especially where damages will not compensate the person with whom he has contracted? In the judgment of Kay, L. J., in Ryan *v.* Mutual Tontine Westminster Chambers Association,[1] after stating that ordinarily the court will not enforce specific performance of building works because damages are generally in such cases an adequate remedy, and the court cannot superintend such works, — of which last objection I have never seen the force, — he said: "An exception to this rule has been established in cases where a railway company has taken lands from a landowner on the terms that it will carry out certain works." Here the defendant has taken land from the plaintiffs on the terms that he will erect buildings. The learned Lord Justice proceeded: "In those cases, because damages are not an adequate remedy, the court has gone to great lengths, and has granted specific performance of the definite works — they must be definite works — which the company that has taken the lands has contracted to do." In the present case I agree with the learned judge that, though the original covenant did not specify the buildings to be erected, the plans referred to by the subsequent agreement define the work to be done sufficiently to enable the court to make an order for specific performance. It is specially important to the plaintiffs as the sanitary authority for the borough of Wolver-

[1] [1893] 1 Ch. 116, at p. 128.

hampton that a piece of land like that in question should not be left vacant in the middle of the town, and that houses should be built upon it, which may be the subject of assessment to the rates. It appears to me that the value of their right to have houses erected by the defendant on the piece of land conveyed to him cannot adequately be estimated by pecuniary damages, and that such damages would not be adequate compensation to them for the breach by the defendant of his contract. For these reasons I come to the conclusion that the learned judge was perfectly right in granting an order for specific performance in this case, and that the application must be dismissed.

COLLINS, L. J. I am of the same opinion. I must confess that I cannot altogether understand the principle upon which courts of equity have acted in sometimes granting orders for specific performance in these cases, and sometimes not. I think that possibly the explanation is that the courts have not uniformly adhered to one principle in such cases. It looks to me as if the views of the courts of equity have gone through a process of development with regard to the subject. In early times they seem to have granted decrees for specific performance in such cases. Then came a period in which they would not grant such decrees on the ground that the court could not undertake to supervise the performance of the contract. Later on again they seem to have attached less importance to this consideration, and returned to some extent to the more ancient practice, holding that they could order specific performance in certain cases in which the works were specified by the contract in a sufficiently definite manner. Whatever the exact principle of equity on the subject may be, I think it is clear on the authorities that the elements exist in this case which in previous cases of a similar kind have been held to justify the court in making a decree for specific performance. In this case land was conveyed to the defendant by the plaintiffs, part of the consideration being the covenant by him to erect buildings on it; by the subsequent agreement the buildings to be erected were specifically defined in all particulars; and, having regard to the circumstances and the position of the plaintiffs, it appears to me that damages would not be an adequate compensation to the plaintiffs for the breach by the defendant of his contract. I think, therefore, that this is a case in which the court has power to make an order for specific performance, and in which such an order ought to be made.

Application dismissed.[1]

[1] In accordance with the doctrine of the principal case decrees of specific performance of agreements were given in the following cases: Storer *v.* Great Western Co., 2 Y. & C C. C. 48 (to build and maintain an archway); Price *v.* Corp. of Penzance, 4 Hare, 506 (to build a market); Sanderson *v.* Cockermouth Co., 11 Beav. 497 (to make such roads, ways, and slips for cattle as may be necessary); Lytton *v.* Great Northern Co., 2 K. & J. 394 (to build a railway siding); Darnley *v.* London Co., 1 D. J. & S. 204, 3 D. J. & S. 24, L. R. 2 H. L. 43 (*semble* — to make railway crossings); Cubitt *v.* Smith, 10 Jur. N. S. 1123, 11 L. T. Rep. 298 S. C. (to build a house); Wells *v.* Maxwell, 32 Beav. 408 (to build a house and road); Raphael *v.* Thames Co., 2 Ch. Ap. 147 (to build a road and bridge); Wilson *v.* Furness Co., 9 Eq. 28 (to build a road and wharf); Greene *v.* West Cheshire Co., 13 Eq. 44 (to build a siding); Wilson *v.* Northampton Co., 9 Ch. 279 (*semble* — agreement too vague);

POWELL DUFFRYN STEAM COAL CO. *v.* TAFF VALE RAILWAY CO.

IN CHANCERY, before SIR W. M. JAMES and SIR G. MELLISH, L. JJ., FEBRUARY 21, 1874.

[*Law Reports*, 9 *Chancery Appeals*, 331.]

THIS was an appeal by the plaintiffs from a decree of Vice-Chancellor Hall, dismissing their bill with costs.

The defendants were lessees of the Aberdare Railway, and were working it under Acts of Parliament with which the Railways Clauses Consolidation Act, 1845, was incorporated.

Part of the Aberdare Railway extended from Abergwaur, near Treaman Station, to Mountain Ash Station, a distance of between two and three miles. At Abergwaur the plaintiffs had a colliery with a siding running into the railway near the Treaman Station, and they had two other collieries with a siding running into the railway at that station. At Mountain Ash Station the railway communicated with the Great Western Railway.

For some years the coal raised from the plaintiffs' collieries had been carried by the defendant company, but in 1871 the plaintiffs, in order to save expense, became desirous of carrying it themselves over the defendants' railway between Abergwaur and Mountain Ash, and on the 12th of December, 1871, gave the Taff Vale Company notice that the plaintiffs, pursuant to the provisions of the Railways Clauses Consolidation Act, 1845, and especially sect. 92, desired to use with the engine and carriages thereinafter mentioned so much of the Aberdare Railway as extended from Abergwaur to Mountain Ash.

Firth *v.* Midland Co., 20 Eq. 100 (to build roads and bridges); Todd *v.* Midland Co., L. R. Ir. 9 Ch. 85; Express Co. *v.* R. R. Co., 99 U. S. 191, 200 (*semble*); Harper *v.* Savannah Co., 69 Ala. 569 (to grade streets and make crossings); South Co. *v.* Highland Co., 98 Ala. 400, 408 (*semble*); Ross *v.* Purse, 17 Colo. 24 (to dig a well); Haisten *v.* Savannah Co., 51 Ga. 199 (*semble* — to build a station); Richmond *v.* Dubuque Co., 33 Iowa, 422, 482 (*semble*); Hubbard *v.* Kansas Co., 63 Mo. 68 (*semble*) (to build a depot — see Martin *v.* Halley, 61 Mo. 196, 201); Gregory *v.* Ingwersen, 32 N. J. Eq. 199 (to build outside stairs); Madison Ass'n *v.* Britten, (N. J. Eq. 1900) 46 Atl. R. 652, 655 (*semble*); Stuyvesant *v.* Mayor, 11 Paige, 414 (to improve and maintain land as a public square); Post *v.* West Shore Co., 123 N. Y. 580 (to build a road and railway crossing); Aikin *v.* Albany Co., 26 Barb. 289 (to build farm crossings over R. R. and a passage under R. R.); Lawrence *v.* Saratoga Co., 36 Hun, 467 (to build bridges — but specific performance was denied in Conger *v.* N. Y. Co., 120 N. Y. 29, of a contract to build a station on land conveyed to the company by plaintiff, because it would be a great burden to the company and of slight benefit to plaintiff, and would diminish instead of increasing public convenience); Kelly *v.* Nypano Co., 23 Pa. Co. Ct. R. 177 (agreement of R. R. Co. to fence along its right of way); Birchett *v.* Bolling, 5 Munf. 442 (to build a hotel); Grubb *v.* Starkey, 85 Va. 831 (to lay a water pipe).

Relief was denied with some hesitation in McCarter *v.* Armstrong, 32 S. Ca. 203 (agreement to dig and maintain a drain on defendant's land for benefit of plaintiff's land); and in Cincinnati Co. *v.* Washburn, 25 Ind. 259; Columbus Co. *v.* Watson, 26 Ind. 50, the court refused to compel R. R. Co. to fence along its line.

See Minneapolis Co. *v.* Cox, 76 Iowa, 306; Kimball *v.* Frey, 74 Wis. 26. — ED.

On the 3d of January, 1872, the plaintiffs' secretary sent a time-table of the proposed times of five up-trains and five down-trains between Treaman and Mountain Ash. No answer having been received, the plaintiffs' secretary, on the 23d of January, wrote again, stating that on and from Thursday, the 1st of February, the plaintiffs would run trains according to the time-table, and that the engines would be those belonging to the Rhymney Railway Company then running on the defendants' railway, and the carriages those mentioned in the former notice.

On the 1st of February, 1872, an engineer went on behalf of the plaintiffs to Mountain Ash Station to take one of the Rhymney engines with a train of empty wagons to the Treaman siding, but found that the gates were locked so as to prevent it passing on to the line. He saw the traffic manager, who said, "I have no instructions about your running on our line, and if you insist you must take the responsibility; but our men shall not move the signals for you," or to that effect. The engineer replied, "If that is the case we cannot proceed." The train accordingly, after some delay, was run back.

On the 8th of February, 1872, the bill was filed, praying for an injunction to restrain the defendants, their servants, and agents, from locking the gates or permitting them to be locked, and from keeping or permitting them to be kept locked, and from making or permitting any other obstruction, or doing or permitting any other thing so as to prevent or interfere with the proposed use of the railway by the plaintiffs; and for damages.

A motion for an injunction was denied by Vice-Chancellor Wickens and the bill, amended by adding the statement that the defendants were bound to make and permit a proper use of the points and signals for the benefit of the plaintiffs, was dismissed with costs by Vice-Chancellor Hall, His Honor being of opinion that, though the plaintiffs had a statutory right to use the railway on fulfilling the requisite conditions, yet, as it could not be used without the points and signals, the court could not grant any relief, for that the court could not give directions as to acts of such a nature that it could not see to their being performed.[1]

Mr. *Greene*, Q. C., and Mr. *Marten*, Q. C., for the appellants.

Mr. *Lindley*, Q. C. (Mr. *Cracknall* with him), for the defendants, was heard as to costs only.

Sir W. M. James, L. J. I am of opinion in this case that the judgment of the Vice-Chancellor cannot be disturbed. True it is that, under the 76th and 92d sections of the Railways Clauses Consolidation Act, the plaintiffs appear to have the right given to them of using this railway with their engines, but, as pointed out by Vice-Chancellor Wickens, and afterwards by Vice-Chancellor Hall, it is impossible for them to exercise that right without danger, unless there is a continuous use of the signals and of the points by the de-

[1] The statement of the case is abridged and the argument for the appellants is omitted. — Ed.

fendants' own people. Now it is, I think, impossible to say that a company ought to be compelled by this court to trust its points and signals, upon which so much of the safety of mankind now depends, to any other persons than its own pointsmen and its own signalmen. If, therefore, relief is given to the plaintiffs, it must in substance involve ordering the defendants to work the points and signals. But it is not the practice of this court to compel by injunction either a company or an individual to do a continuous act which requires the continuous employment of people. The court will in a proper case restrain a man from singing at one theatre, but it will not undertake to compel him to sing at another; it may restrain him from writing a book for one publisher, but it cannot compel him to write a book for another. Where what is required is not merely to restrain a party from doing an act of wrong, but to oblige him to do some continuous act involving labor and care, the court has never found its way to do this by injunction. Both the learned Vice-Chancellors say that in all their experience they have never known such an injunction granted. My experience is the same. I think, therefore, that the order dismissing the bill must remain affirmed. At the same time it is to be observed that the plaintiffs come here to enforce a right which the Act of Parliament gives them, and which the legislature intended them to have, and that they do not fail on the merits, the question as to the approval of the engines being a mere thing thrown in, and the real question between the parties having throughout been whether the plaintiffs have a right to use the railway at all. The plaintiffs fail only because of the difficulty in the way of this court's enforcing such a right — a difficulty which to my mind is insuperable. As their case, then, fails, not on the merits, but on the ground of the difficulty in giving them a remedy, I think that the bill should be dismissed without costs.

Sir G. Mellish, L. J. I am of the same opinion.[1]

[1] Specific execution of agreements involving continuous performance of an act was denied in the following cases: Hooper *v.* Broderick, 11 Sim. 47 (to keep the demised property open as an inn); Booth *v.* Pollard, 4 Y. & C. 61 (to work a quarry); Pollard *v.* Clayton, 1 K. & J. 462 (to work a colliery and sell all the product to the plaintiff); Blackett *v.* Bates, 1 Ch. Ap. 154 (agreement by A to furnish engine power to draw B's railway wagons so long as A during a lease of 21 years should keep an engine for his own use on the railway, and to keep the railway in good repair during the lease); Ryan *v.* Mutual Association, 1893, 1 Ch. 116 (to secure to the tenants of an apartment house continuously the services of a resident porter charged with the performance of a great variety of duties); Keith *v.* Nat. Telephone Co., 1894, 2 Ch. 147 (*semble* — to erect telephonic apparatus upon plaintiff's premises and maintain it for three years. But injunction issued against cutting off the wires); Wheatley *v.* Westminster Co., 9 Eq. 538 (to work uninterruptedly and efficiently a coal mine); Phipps *v.* Jackson, 56 L. J. Ch. 550 (to keep a farm well stocked with horses and cattle); Marble Co. *v.* Ripley, 10 Wall. 340, 358 (to furnish a perpetual supply of marble from a quarry); Texas Co. *v.* Marshall, 136 U. S. 393 (*semble* — to maintain permanently railway shops and offices at a particular town); Stanton *v.* Singleton, 126 Cal 657 (to develop and operate mines); Atlanta Co. *v.* Spear, 32 Ga. 550 (R. R. Co. to deliver upon and take from a platform on plaintiff's land near the railway all goods shipped to or offered by the plaintiff); Louisville Co. *v.* Bodenschatz, 141 Ind. 251, 264 (*semble*); Richmond Co. *v.* Dubuque Co., 33 Iowa, 422 (to give to owner of an elevator the handling of all through grain carried by defendant, a railway company); Blanchard *v.* Detroit Co., 31 Mich. 43 (to stop one train each way daily at a station to be erected by

HOOD *v.* NORTH EASTERN RAILWAY CO.

IN CHANCERY, BEFORE SIR W. M. JAMES, V. C., JULY 29, 1869.

[*Law Reports*, 8 *Equity*, 666.]

THIS was a bill by the owner of the Pepper Hall estate in Yorkshire, to enforce specific performance of an agreement entered into in 1838 between the Great North of England Railway Company (now vested in the defendants the North Eastern Railway Company) and the plaintiff's predecessors in title, for the permanent use of certain land, then purchased by the company, as a first-class station and goods depot.

SIR W. M. JAMES, V. C.[1] The plaintiff is clearly entitled to the benefit of the covenant between the railway company, now represented by the North Eastern Railway Company, and his predecessor in title Lord Alvanley. The covenant was one by which, in consideration of Lord Alvanley giving up his land to the company and allowing them to go through his estate for about three miles, they deliberately bargained with him — it being one of the terms introduced by him in the course of the negotiation, and one on which he insisted, and to which they deliberately assented — that he should have on his estate, for the convenience of himself and his tenants, "a first-class station for the purpose of taking up and setting down passengers travelling along the said railway."

There being, therefore, no substantial difficulty in ascertaining the meaning, and the company not having, in my opinion, done anything of late years to keep this up as a first-class station, it remains to be considered whether I can in this suit give the plaintiff relief, or whether I am obliged to do that which is almost a scandal to our law, drive a man to what used to be called "the other side of Westminster Hall," and say I will dismiss your bill without prejudice to an action. I think I am not obliged to do that, but that I am in a position to give the plaintiff substantial relief, based upon the breach of the covenant committed by the company, without imposing any unnecessary or unreasonable burden upon the company. Upon the evidence not only the trains which ought to have been stopped are not stopped, but the accommodation originally provided by the company (and then it seems to have been barely sufficient) has been gradually withdrawn, and become worse and worse, so that it is now as bad as a third-class station.

defendant company on land conveyed to it by the plaintiff); Niagara Co. *v.* Great Western Co., 39 Barb. 212 (to collect and to make proper regulations for the collection of bridge tolls from local passengers); Port Clinton Co. *v.* Cleveland Co., 13 Oh. St. 544 (to manage and operate a railroad); Koch's App., 93 Pa. 434 (agreement to work a mine on plaintiff's land); Pittsburgh Co.'s App., 99 Pa. 177 (to use a telegraph line erected by plaintiff on defendant's railroad line and pay plaintiff a proportion of the earnings); McCann *v.* South Nashville Co., 2 Tenn. Ch. 773 (to run cars on a street railway at suitable intervals). — ED.

[1] Only a portion of the Vice-Chancellor's judgment is given. — ED.

MINUTE OF DECREE. — Declare that the company has committed a breach of its covenant in not *bona fide* using and employing the parcel of ground in the bill mentioned as and for a first-class station or place for the purposes of taking up and setting down passengers travelling along the railway in the bill mentioned.

Restrain the railway company from allowing any of its ordinary or fast trains, other than mail, express, or special trains, to pass the station without staying there for the purpose of taking and setting down passengers.[1]

THE PROSPECT PARK AND CONEY ISLAND RAILROAD CO., APPELLANT, *v.* THE CONEY ISLAND AND BROOKLYN RAILROAD CO., RESPONDENT.

IN THE COURT OF APPEALS, NEW YORK, DECEMBER 11, 1894.

[144 *New York Reports*, 152.]

BARTLETT, J.[2] The parties to this action entered into a contract June 1, 1882, and the plaintiff seeks to compel its specific performance.

At the time of making the contract the plaintiff owned a steam surface railroad, usually known as "Culver's Coney Island Railroad," which extended from Coney Island to a depot at the corner of Ninth Avenue and Twentieth Street in the city of Brooklyn and adjoining Greenwood Cemetery; the plaintiff also owned certain horse-car railroads, which were entirely distinct from the steam railroad, extending from the depot to Fulton Ferry; the plaintiff also owned a charter entitling it to construct a horse-car line from the depot to Hamilton Ferry and other points.

The defendant, at the time of executing the contract, was operating certain horse-car lines which ran from Hamilton, Fulton, and other ferries and from the East River bridge to Ninth Street and Ninth Avenue, and through Ninth Avenue to Fifteenth Street, on Fifteenth Street to Coney Island Avenue, and thence to Coney Island; these lines were operated wholly by horses.

By the contract the plaintiff granted the defendant the right to use its tracks on Ninth Avenue from Fifteenth Street to the depot at Ninth Avenue and Twentieth Street, free of charge for twenty-one years from June 1st, 1882.

The defendant covenanted to run during the spring, summer, and fall

[1] Affirmed in 5 Ch. 525, but with a certain modification as to the meaning of the words "first-class station."

To the same effect are Phillips *v.* Great Eastern Co., 7 Ch. 409 (*semble*); Richmond *v.* Dubuque Co., 33 Iowa, 422, 482; Lawrence *v.* Saratoga Co., 36 Hun, 467.

But see *contra*, Blanchard *v.* Detroit Co., 31 Mich. 43 (*semble*).

In Chubb *v.* Peckham, 13 N. J. Eq. 207, a decree was given that the defendant should perform his contract to support his parents by paying a weekly provision. — ED.

[2] Only so much of the opinion is given as relates to specific performance. — ED.

months to plaintiff's depot cars to connect with the ferries and all plaintiff's trains to and from Coney Island.

The plaintiff agreed to furnish defendant necessary terminal facilities at the depot.

This contract was obviously advantageous to both parties; the plaintiff secured passengers to Coney Island from defendant's lines, and the defendant greatly increased its travel by having a direct connection with steam transit to Coney Island.

The defendant's horse-car line to Coney Island could not successfully compete with plaintiff's steam route.

The plaintiff provided defendant with the necessary terminal facilities as required, and the contract was acted upon by both parties until the month of October, 1889.

At that time there was a change in defendant's management, and the company contracted for an electrical equipment from the Parade Ground to Coney Island, commonly known as the trolley system.

The plaintiff, in May, 1890, finding that defendant was not running cars to the depot as required by the contract, requested performance, and was advised that the defendant was under no obligations to run the cars and did not intend to do it.

The learned counsel for the defendant insists that equity will not enforce the specific performance of a contract having some years to run which requires the exercise of skill and judgment and a continuous series of acts.

While there is some conflict in the cases, and all are not to be reconciled, yet the great weight of authority permits specific performance in the case at bar.

The Special Term enjoined the defendant from operating any of its cars unless it performs its contract with the plaintiff.

The provisions of this contract are neither complicated nor difficult and are such as a court of equity can enforce in its discretion.

A few of the cases may be referred to as illustrating the power vested in a court of equity to compel the specific performance of contracts similar to the one at bar.

In Storer *v.* Great Western Railway Co.[1] the court compelled the defendant to construct and forever maintain an archway and its approaches. The court said there was no difficulty in enforcing such a decree.

In Wilson *v.* Furness Ry. Co.[2] the defendant was compelled to erect and maintain a wharf. See, also, Green *v.* West Cheshire R. Co.[3]

In Wolverhampton & W. R. Co. *v.* London & N. W. R. Co.[4] the agreement between the two companies was that the defendant should work the plaintiff's line, and during the continuance of the agreement develop and accommodate the local and through trade thereof and carry over it certain specific traffic.

The bill was filed to restrain the defendant from carrying a portion

[1] 2 Young & Coll. N. R. 48.
[2] Law Rep. 9 Equity Cases, 28.
[3] Law Rep. 13 Equity Cases, 44.
[4] Law Rep. 16 Eq. Cas. 433.

of the traffic which ought to have passed over the plaintiff's line by other lines of the defendant.

The point was made that the court could not undertake to enforce specific performance, because it would require a series of orders and a general superintendence to enforce the performance, which could not conveniently be administered by a court of justice. The injunction issued and Lord Selborne said (p. 438): "With regard to the argument that upon the principles applicable to specific performance no relief can be granted, I cannot help observing that there is some fallacy and ambiguity in the way in which in cases of this character those words specific performance are used. . . . The common expression, as applied to suits known by that name, presupposes an executory as distinct from an executed agreement. . . . Confusion has sometimes arisen from transferring considerations applicable to suits for specific performance, properly so called, to questions as to the propriety of the court requiring something or other to be done in specie. . . . Ordinary agreements for work and labor to be performed, hiring and service and things of that sort, out of which most of the cases have arisen, are not, in the proper sense of the word, cases for 'specific performance;' in other words, the nature of the contract is not one which requires the performance of some definite act, such as the court is in the habit of requiring to be performed by way of administering superior justice, rather than to leave the parties to their remedies at law. . . . The question is whether the defendants, being in possession, they are not at liberty to depart from the terms on which it was stipulated that they should have that possession."

The American cases are equally clear.

In Lawrence *v.* Saratoga Lake Ry. Co.[1] the defendant was, among other things, to erect a depot at which all trains were to stop. Specific performance was decreed, the court holding that, although under the agreement the defendant could not be compelled to run trains upon its road, yet it might properly be enjoined from running any regular trains which did not stop at the station.

The objection that the judgment in this case involves continuous acts and the constant supervision of the court is well met by the reasoning in Central Trust Company *v.* Wabash, St. Louis & P.[2] being affirmed as Joy *v.* St. Louis,[3] where Judge Blatchford wrote the opinion.

As to inconvenience or circumstances which affect the interest of one party alone constituting a reason why performance should not be decreed, the case of Marble Co. *v.* Ripley[4] furnishes a clear discussion of the general principles involved.

The rule established by the above and kindred cases is that a contract is to be judged as of the time at which it was entered into, and if fair when made the fact that it has become a hard one by the force of subsequent circumstances or changing events will not necessarily prevent its specific performance. See, also, Stuart *v.* London & N. W.

[1] 36 Hun, 467. [2] 29 Fed. Rep. 546. [3] 138 U. S. 1, 47, 50. [4] 10 Wall. 339, 358.

Ry. Co.,[1] Mortimer *v.* Capper,[2] Jackson *v.* Lever,[3] Paine *v.* Meller,[4] Paine *v.* Hutchinson,[5] Franklin Tel. Co. *v.* Harrison.[6]

A large number of other cases might be cited sustaining the power of the court to decree the specific performance of this contract, but we do not deem it necessary.

There can be no well-founded doubt as to the power of the court in the premises, and the important question is whether in the exercise of a wise discretion and in view of all the circumstances specific performance should be decreed.

After a most careful consideration of this case we have reached the conclusion that the plaintiff is entitled to have the contract specifically performed.

The order of the General Term is reversed and the judgment of the Special Term is affirmed, with costs in all the courts.

All concur, except Andrews, Ch. J., who dissents.

Ordered accordingly.[7]

[1] 15 Beavan, 513. [2] 1 Bro. C. C. 156. [3] 3 Bro. C. C. 605.
[4] 6 Ves. 349. [5] L. R. 3 Eq. Cas. 257. [6] 145 U. S. 459, 472, 473.
[7] Cited with approval in Standard Co. *v.* Siegel Co., 157 N. Y. 60, 66.

Specific performance of agreements to act continuously was decreed in the following cases:

Wolverhampton Co. *v.* London Co., 16 Eq. 433 (agreement of a railway company to develop and accommodate local traffic along one of its lines).

[Joy *v.* St. Louis, 138 U. S. 1, affirming s. c. 29 Fed. R. 546. (Defendant railroad company agreed to permit the use of its tracks through Forest Park, immediately west of St. Louis, by the plaintiff company, the defendant company to have control of the running of the trains of both companies through the park, and to maintain and keep in order the tracks and terminal facilities.)]

(Union Co. *v.* Chicago Co., 163 U. S. 564. (The Union Pacific Company, the defendant, agreed to grant to the Rock Island Company the right to use the former's bridge and tracks between Council Bluffs and South Omaha for the term of 999 years, to make with equal regard for the rights of both parties schedules of rules and regulations for the movement of the engines and trains of both companies over these tracks, all trains to be moved under the immediate direction of the superintendent or other officer of the Union Pacific Company.))

Louisville Co. *v.* Illinois Co., 174 Ill. 448 (L. Co. in return for right to cross tracks of I. Co. agreed to maintain crossing-frogs and to provide necessary signals and watchmen at the crossing for the safety of all trains of each R. R. Co.)

Schmidtz *v.* Louisville Co., 101 Ky. 441. (Agreement by the lessee of the Cumberland and Ohio R. R. Co. to operate the leased road throughout the term of 30 years. But see Port Clinton Co. *v.* Cleveland Co., 13 Oh. St. 544.)

In Joy *v.* St. Louis, *supra*, the court said, per Blatchford, J., pp. 47 and 49: "In the present case, it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash Company for the running of trains upon its tracks by the Colorado Company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. . . .

"Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficent functions." — ED.

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S. WAKEHAM, Appellant, *v.* J. S. BARKER, Respondent.

Supreme Court, California, December 13, 1889.

[82 *California Reports*, 46.]

Fox, J.[1] This is an action for the specific performance of a contract for the sale of real estate. Plaintiff also prays for damages for non-performance; and in case specific performance cannot be had, then for judgment for compensation for the payments already made, with damages for non-performance.

The complaint shows that the plaintiff and defendant entered into an agreement in writing for the sale by defendant to plaintiff, who also bound himself to buy a certain tract of land in consideration of fifty dollars paid down, and the further sum of seven hundred dollars, to be thereafter paid in money, in monthly instalments of twenty dollars each, with interest on all unpaid balances, payable monthly, at the rate of nine per cent. per annum. If the contract had stopped there, there would have been no difficulty in plaintiff, if not himself in default, enforcing specific performance against the defendant. But unfortunately for the enforcement of that remedy, afterward, and on the same day, the parties entered into a supplemental agreement in writing, whereby they modified and entirely changed the original agreement as to the mode, manner, and time of payment. By this second agreement the interest was reduced to six per cent. per annum, and the defendant agreed to take his pay, and the plaintiff agreed to pay the said seven hundred dollars and interest, in work and labor, to wit, in painting and graining, at an agreed price per square yard, the defendant to furnish the plaintiff with painting and graining to do at the price so fixed, and to pay him fifty per cent. of the price so fixed in cash, the remaining fifty per cent. to apply on account of the said seven hundred dollars and the interest thereon, until the whole amount thereof was paid, "the entire amount to be taken out within one year from September 1, 1884."

It is a well-settled rule of law that specific performance will not be enforced against either party if it cannot be so enforced against the other. It is also well settled that specific performance for personal service cannot be enforced.[2] It follows that the moment this supple-

1 Only a portion of the opinion of the court is given. — Ed.

2 Pickering *v.* Ely, 2 Y. & C. C. C. 249 (confidential servant); Baldwin *v.* Society, 9 Sim. 393 (map-maker); Johnson *v.* Shrewsbury, 3 D. M. & G. 914 (confidential employee); Webb *v.* England, 29 Beav. 44 (apprentice); Wolverhampton Co. *v.* London Co., 16 Eq. 433, 439 (*semble*); Rigby *v.* Connol, 14 Ch. D. 482, 487 (*semble*); De Francesco *v.* Barnum, 45 Ch. D. 430, 438 (*semble*); Marble Co. *v.* Ripley, 10 Wall. 340, 358 (expert); Metropolitan Co. *v.* Ewing, 42 Fed. R. 198 (ball player); Iron Age Co. *v.* Western Co., 83 Ala. 498, 507 (*semble*); Rogers Co. *v.* Rogers, 58 Conn. 356 (agent); Willingham *v.* Hooven, 74 Ga. 233 (mechanic); Clark's Case, 1 Blackf. 122 (menial servant); Burton *v.* Marshall, 4 Gill, 487 (actor); Alworth *v.* Seymour, 42 Minn. 526 (real estate agent); Hamblin *v.* Dinneford, 2 Edw. 529 (actor); Fredericks *v.* Mayer, 1 Bosw. 227, 231 (actor); Sanquirico *v.* Benedetti, 1 Barb. 315

mental agreement was made, specific performance could not be enforced against the plaintiff, and consequently, so long as the contract was not fully performed on his part, he could not enforce it against the other. Nevertheless, whenever he shows that without default he has fully performed on his own part, he may compel the other to convey as he has agreed to, or if conveyance cannot be had, may recover in damages for the breach. But his present complaint does not make a sufficient showing for this purpose.

WORKS, J., and PATERSON, J., concurred.

(actor); De Pol *v.* Solke, 7 Rob. N. Y. 280 (dancer); Mapleson *v.* Del Puente, 13 Abb. N. C. 144, 146 (singer); Metropolitan Co. *v.* Ward, 24 Abb. N. C. 393 (ball player); Port Clinton Co. *v.* Ward, 13 Oh. St. 544, 550 (*semble*); Harrisburg Club *v.* Athletic Ass'n, 8 Pa. Co. Ct. 337, 338 (ball player); Starnes *v.* Newsom, 1 Tenn. Ch. 239 (farmer); Campbell *v.* Rust, 85 Va. 653, 667.

Similarly, one whose services have been engaged cannot have a decree of specific performance of the contract against the employer. Stocker *v.* Brockelbank, 3 Macn. & G. 250 (manager); Johnson *v.* Shrewsbury, 3 D. M. & G. 914 (confidential servant); Webb *v.* England, 29 Beav. 44 (apprentice); Brett *v.* E. I. Co., 2 H. & M. 404 (broker); Chinnock *v.* Saintsbury, 30 L. J. Ch. 409 (agent); Horne *v.* London Co., 10 W. R. 170 (agent); Ogden *v.* Fossick, 4 D. F. & J. 426 (manager); White *v.* Boby, 26 W. R. 133 (agent); Bertram *v.* Hale, 27 Sol. J. 39 (agent); Bainbridge *v.* Smith, 41 Ch. D. 462, 474 (managing director); Gillis *v.* McGehee, 13 Ir. Ch. R. 48, 57 (manager); Schwier *v.* Zitike, 136 Ind. 210 (school teacher); Seiler *v.* Fairex, 23 La. An. 397 (manager); Healey *v.* Allen, 38 La. An. 867 (sexton); Bronk *v.* Riley, 50 Hun, 489 (superintendent); Miller *v.* Warner, 42 N. Y. Ap. Div. 208 (superintendent). — ED.

MISCELLANEOUS CASES OF SPECIFIC PERFORMANCE OF AFFIRMATIVE CONTRACTS. — Agreement to accept chattels in satisfaction of claim. Very *v.* Levy, 13 How. 345; Apperson *v.* Gogin, 3 Ill. Ap. 48; Chicora Co. *v.* Dunan (Md. 1900), 50 L. R. A. 401.

To give a deed of annuity. Aubin *v.* Holt, 2 K. & J. 66.

To satisfy a judgment against a third person. Phillips *v.* Bergen, 8 Barb. 527.

To levy assessments on members of benefit society for benefit of a deceased member. Benefit Ass'n *v.* Sears, 114 Ill. 108. (Compare Covenant *v.* Kentner, 89 Ill. Ap. 495.)

Specific performance was refused of agreements

To care for and support the plaintiff. Lindsay *v.* Glass, 119 Ind. 301; Mowers *v.* Fogg, 45 N. J. Eq. 120.

To permit plaintiff to repair his ship in defendant's shipyard. Merchants Co. *v.* Banner, 12 Eq. 18.

agmt + acpt Stofcln v clen in dtls – 13 How. 345; 50 L. R. A. 401.
Agmt + gv a deed annuity, 2 K. Johnson

SECTION I. (*Continued*).

(*b*) Negative Contracts.

MORRIS *v.* COLMAN.

In Chancery, before Lord Eldon, C., January 14, 1812.

[18 *Vesey*, 437.]

Various disputes having arisen among the proprietors of the theatre in the Haymarket, a bill was filed; praying an execution of the articles of agreement, an injunction to restrain Mr. Colman from acting as manager, and a reference to the master for the appointment of a manager.

An injunction was granted: and a reference directed to the master to inquire, whether the defendant Mr. Colman had performed the duties of manager, and what he was doing and could do in the discharge of those duties. Upon a motion to dissolve the injunction, a question arose upon the validity of a clause in the articles restraining Mr. Colman from writing dramatic pieces for any other theatre, or, as the construction was represented for the plaintiff, giving the Haymarket Theatre a right of preëmption.

The Lord Chancellor. I cannot perceive any violation of public policy in this provision. The case of trade, to which it has been compared, is perfectly distinct. It is well settled upon that principle, that notwithstanding such a covenant, restraining trade in general, a man shall be at liberty to engage in commerce: but that has been broken in upon to the extent of giving effect to covenants restraining trade within particular limits; and in partnership engagements a covenant, that the partners shall not carry on for their private benefit that particular commercial concern, in which they are jointly engaged, is not only permitted, but is the constant course.

If that is so with regard to trade, it is impossible to maintain that theatrical performers, who act only under a license, and are treated as vagrants if not licensed, may not enter into such engagements. The contract is not unreasonable upon either construction; whether it is, that Mr. Colman shall not write for any other theatre without the license of the proprietors of the Haymarket Theatre; or whether it gives to those proprietors merely a right of preëmption. If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for that theatre alone? Why should they not thus engage for the talents of each other? The ground might be supposed, that nothing could be made of the theatre without exhibiting the talents of such a man; and in this instance that he may get more to himself and the other proprietors by this contract than he could by hard bargains at other theatres.

I cannot therefore see anything unreasonable in this: on the contrary, it is a contract, which all parties may consider as affording the most eligible, if not the only, means of making this theatre profitable to them all, as proprietors, authors, or in any other character which they are by the contract to hold.

CLARKE *v.* PRICE.

In Chancery, before Lord Eldon, C., July 22, 1819.

[2 *Wilson's Chancery*, 157.]

It was mutually agreed by the defendant, George Price, Esqr., and the plaintiffs, William Clarke and Sons, publishers, that the defendant should compose and write and that the plaintiffs should print the cases in the Court of Exchequer during a certain period, with provisions for meeting the expenses and dividing the profits of the published reports. During the publication of the fourth volume of Price's Reports, the defendant entered into an agreement with other publishers for subsequent volumes. The plaintiffs thereupon filed this bill praying that Mr. Price be decreed specifically to perform his agreement to deliver to them for printing the reports of cases in the Court of Exchequer, and also praying an injunction to restrain Mr. Price from delivering such reports to any other publisher. There was no reference in the agreement to the right of the defendant to write reports for other persons than the plaintiffs.

An injunction having been obtained *ex parte*, on the filing of the bill, and on affidavit, a motion was now made to dissolve it.[1]

The Lord Chancellor. The case of Morris *v.* Colman is essentially different from the present. In that case, Morris, Colman, and other persons were engaged in a partnership in the Haymarket Theatre, which was to have continuance for a very long period, as long indeed as the theatre should exist. Colman had entered into an agreement which I was very unwilling to enforce; not that he would write for the Haymarket Theatre, but that he would not write for any other theatre. It appeared to me that the court could enforce that agreement by restraining him from writing for any other theatre. The court could not compel him to write for the Haymarket Theatre; but it did the only thing in its power: it induced him indirectly to do one thing, by prohibiting him from doing another. There was an express covenant on his part contained in the articles of partnership. But the terms of the prayer of this bill do not solve the difficulty; for if this contract is one which the court will not carry into execution, the court cannot indirectly enforce it, by restraining Mr. Price from doing some other act. This is an agreement which expressly provides that Mr. Price shall write and compose reports of cases to be published

[1] The statement is condensed and the arguments are omitted. — Ed.

by the plaintiffs. In Morris *v.* Colman, there was a decree directing the partnership to be carried on; it could not be put an end to; and it was the duty of the parties to interfere. But I have no jurisdiction to compel Mr. Price to write reports for the plaintiffs. I cannot, as in the other case, say, that I will induce him to write for the plaintiffs, by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs; which I have not the means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear, that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case. *Injunction dissolved.*

KEMBLE *v.* KEAN.

IN CHANCERY, BEFORE SIR LANCELOT SHADWELL, V. C., DECEMBER 1, 1829.

[6 *Simons*, 333.]

THE defendant, although under contract to act ten nights for the plaintiffs, proprietors of Covent Garden Theatre, and not to act elsewhere in London until his contract was performed, entered into an engagement to act at Drury Lane Theatre, before completing his former engagement. The plaintiffs thereupon filed this bill praying that the defendant might be decreed specifically to perform his agreement with them, and that, in the mean time, he might be restrained from acting at Drury Lane Theatre or at any other place in London.[1]

THE VICE-CHANCELLOR. The agreement in question is such an one as this court cannot perform.

In the case of a mere contract between two persons who are both carrying on the same trade, that one shall not carry on his trade within a limited distance in which the party contracted with intends to carry on his trade, the whole agreement is of so genuine a kind, that the court would enforce the performance of the agreement by restraining the party, by injunction, from breaking the agreement so made.

In the case where the parties are partners, and one of the partners contracts that he shall exert himself for the benefit of the partner-

1 The statement of the case is much condensed, and a portion of the judgment of the Vice-Chancellor, in which he commented on Morris *v.* Colman and Clarke *v.* Price, is omitted. — ED.

ship, though the court, it is true, cannot compel a specific performance of that part of the agreement, yet, there being a partnership subsisting, the court will restrain that party (if he has covenanted that he will not carry on the same trade with other persons) from breaking that part of the agreement. That is in case of a partnership.

In this case, however, there is no partnership whatever between the proprietors of Covent Garden Theatre and Mr. Kean; but the contract is nothing more than this, that Mr. Kean shall, for a given remuneration, act a certain number of nights at Covent Garden Theatre, with a proviso that in the mean time he shall not act at any other theatre; and it is quite clear that this bill is filed for the purpose of having the performance of an agreement with regard to his contract to act.

It appears to me, that it is utterly impossible that this court can execute such an agreement.

In the first place, independently of the difficulty of compelling a man to act, there is no time stated; and it is not stated in what characters he shall act; and the thing is, altogether, so loose that it is perfectly impossible for the court to determine upon what scheme of things Mr. Kean shall perform his agreement. There can be no prospective declaration or direction of the court, as to the performance of the agreement; and, supposing Mr. Kean should resist, how is such an agreement to be performed by the court? Sequestration is out of the question; and can it be said that a man can be compelled to perform an agreement to act at a theatre by this court sending him to the Fleet for refusing to act at all? There is no method of arriving at that which is the substance of the contract between the parties, by means of any process which this court is enabled to issue; and therefore (unless there is some positive authority to the contrary) my opinion is that, where the agreement is mainly and substantially of an active nature, and is so undetermined that it is impossible to have performance of it in this court, and it is only guarded by a negative provision, this court will leave the parties, altogether, to a court of law, and will not give partial relief by enforcing only a negative stipulation. I think, for the reasons which I have stated, that what Lord Eldon has said in the case of Morris *v.* Colman bears upon this case.

For the reasons which I have stated, I am of opinion that, if this cause were now being heard, and the agreement were admitted to be such as it appears to be, this court could not make any decree, but must dismiss the bill.

I should be extremely unwilling to have it thought that I am setting my judgment in opposition to any express opinion of the Lord Chancellor's. I have always thought it to be the duty of a judge of this court, knowing the opinion upon any point expressed by the Lord Chancellor, to follow it, as the immediate consequence of not following it would be an appeal to him. It does not however appear that the attention of the Lord Chancellor was particularly called to this point. The application was an application *ex parte;* and, there-

fore, I may, without impropriety, say that my opinion is that this injunction ought to be dissolved.[1]

LUMLEY *v.* WAGNER.

IN CHANCERY, BEFORE LORD ST. LEONARDS, C., MAY 26, 1852.

[1 *De Gex, Macnaghten, and Gordon*, 604.]

THE LORD CHANCELLOR.[2] The question which I have to decide in the present case arises out of a very simple contract, the effect of which is that the defendant Johanna Wagner should sing at Her Majesty's Theatre for a certain number of nights, and that she should not sing elsewhere (for that is the true construction) during that period. As I understand the points taken by the defendants' counsel in support of this appeal, they in effect come to this, namely, that a court of equity ought not to grant an injunction except in cases connected with specific performance, or where the injunction being to compel a party to forbear from committing an act (and not to perform an act), that injunction will complete the whole of the agreement remaining unexecuted.

I have then to consider how the question stands on principle and on authority, and in so doing I shall observe upon some of the cases which have been referred to and commented upon by the defendants in support of their contention. The first was that of Martin *v.* Nutkin,[3] in which the court issued an injunction restraining an act from being done where it clearly could not have granted any specific performance: but then it was said that that case fell within one of the exceptions which the defendants admit are proper cases for the interference of the court, because there the ringing of the bells, sought to be restrained, had been agreed to be suspended by the defendant in consideration of the erection by the plaintiffs of a cupola and clock, the agreement being in effect the price stipulated for the defendant's relinquishing bell-ringing at stated periods; the defendant having accepted the benefit, but rejected the corresponding obligation, Lord Macclesfield first granted the injunction which the Lords Commissioners, at the hearing of the cause, continued for the lives of the plaintiffs. That case, therefore, however it may be explained as one

1 Kimberley *v.* Jennings, 6 Sim. 340, 351 (*semble*); Burton *v.* Marshall, 4 Gill, 487 (actor — *semble*), (but see Hahn *v.* Concordia Co., 42 Md. 460); Hamblin *v.* Dinneford, 2 Edw. 529 (actor); Barnum *v.* Randall, (N. Y. 1844) 2 West. L. J. 96 (giant); Sanquirico *v.* Benedetti, 1 Barb. 315 (actor); Delavan *v.* McCarte, (Hamilton Co., Ohio, Com. Pleas, 1847) (equestrian); Ford *v.* Jermon, 6 Phila. 6 (actor); Harrisburg Club *v.* Athletic Ass'n, 8 Pa. Co. Ct. 337 (*semble* — ball player. But see Phila. Club *v.* Hallman, 20 Phila. 276 — ball player — and American Ass'n *v.* Pickett, 8 Pa. Co. Ct. 232 — ball player) *Accord*.

See also De Rivafinoli *v.* Corsetti, 4 Paige, 264. — ED.

2 Only the judgment of the Lord Chancellor is given. — ED.

3 2 P. W. 266.

of the exceptional cases, is nevertheless a clear authority showing that this court has granted an injunction prohibiting the commission of an act in respect of which the court could never have interfered by way of specific performance.

The next case referred to was that of Barret *v.* Blagrave,[1] which came first before Lord Loughborough and afterwards before Lord Eldon.[2] There a lease had originally been granted by the plaintiffs, the proprietors of Vauxhall Gardens, of an adjoining house, under an express covenant that the lessee would not carry on the trade of a victualler or retailer of wines, or generally any employment that would be to the damage of the proprietors of Vauxhall Gardens; an underlease having been made to the defendants, who were violating the covenant by the sale of liquors, the proprietors of Vauxhall Gardens filed a bill for an injunction, which was granted by Lord Loughborough. It has been observed in the argument here, that in granting the injunction Lord Loughborough said, "It is in the nature of specific performance," and that therefore that case also falls under one of the exceptional cases. When that case came before Lord Eldon, he dissolved the injunction, but upon a different ground, namely, on that of acquiescence for many years, and in a sense he treated it as a case of specific performance. As far as the words go, the observations of those two eminent judges would seem to justify the argument which has been addressed to me; in effect, however, it was only specific performance, because a prohibition, preventing the commission of an act, may as effectually perform an agreement as an order for the performance of the act agreed to be done. The agreement in that case being, that the house should not be opened for the purposes of entertainment to the detriment of Vauxhall Gardens, the court granted the injunction; that was a performance of the agreement in substance, and the term "specific performance" is aptly applied in such a case, but not in the sense in which it has been used before me.

It was also contended that the plaintiff's remedy, if any, was at law; but it is no objection to the exercise of the jurisdiction by injunction, that the plaintiff may have a legal remedy. The case of Robinson *v.* Lord Byron,[3] before Lord Thurlow, so very often commented upon by succeeding judges, is a clear illustration of that proposition, because in that case the defendant, Lord Byron, who had large pieces of water in his park which supplied the plaintiff's mills, was abusing his right by preventing a regular supply to the plaintiff's mill, and although the plaintiff had a remedy at law, yet this court felt no difficulty in restraining Lord Byron by injunction from preventing the regular flow of the water. Undoubtedly there are cases such as that cited for the defendants of Collins *v.* Plumb,[4] before Lord Eldon, in which this court has declined to exercise the power (which in that instance it was assumed to have had) of preventing the commission of an act, because such power could not be properly

[1] 5 Ves. 555.
[2] 6 Ves. 104.
[3] 1 Bro. C. C. 588.
[4] 16 Ves. 454.

and beneficially exercised. In that case the negative covenant, not to sell water to the prejudice of the plaintiffs, was not enforced by Lord Eldon, not because he had any doubt about the jurisdiction of the court (for upon that point he had no doubt), but because it was impossible to ascertain every time the water was supplied by the defendants, whether it was or not to the damage of the plaintiffs; but whether right or wrong, that learned judge, in refusing to exercise the jurisdiction on very sufficient grounds, meant in no respect to break in on the general rules deducible from the previous authorities.

At an early stage of the argument I adverted to the familiar cases of attorneys' clerks and surgeons' and apothecaries' apprentices, and the like, in which this court has constantly interfered, simply to prevent the violation of negative covenants; but it was said that in such cases the court only acted on the principle that the clerk or apprentice had received all the benefit, and that the prohibition operated upon a concluded contract, and that therefore the injunction fell within one of the exceptional cases. I do not, however, apprehend that the jurisdiction of the court depends upon any such principle: it is obvious that in those cases the negative covenant does not come into operation until the servitude is ended, and therefore that the injunction cannot be required or applied for before that period.

The familiar case of a tenant covenanting not to do a particular act was also put during the argument; but it was said that in such a case the jurisdiction springs out of the relation of landlord and tenant, and that the tenant having received the benefit of an executed lease, the injunction operates only so as to give effect to the whole contract; that, however, cannot be the principle on which this court interferes, for, beyond all doubt, where a lease is executed containing affirmative and negative covenants, this court will not attempt to enforce the execution of the affirmative covenants, either on the part of the landlord or the tenant, but will leave it entirely to a court of law to measure the damages; though with respect to the negative covenants, if the tenant for example has stipulated not to cut or lop timber, or any other given act of forbearance, the court does not ask how many of the affirmative covenants on either side remain to be performed under the lease, but acts at once by giving effect to the negative covenant, specifically executing it by prohibiting the commission of acts which have been stipulated not to be done. So far, then, each of the cases to which I have referred appears to me to be in direct contravention of the rules which have been so elaborately pressed upon me by the defendants' counsel.

The present is a mixed case, consisting not of two correlative acts to be done, one by the plaintiff and the other by the defendants, which state of facts may have and in some cases has introduced a very important difference, — but of an act to be done by J. Wagner alone, to which is superadded a negative stipulation on her part to abstain from the commission of any act which will break in upon her affirmative covenant — the one being ancillary to, concurrent, and operating together

with the other. The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract, it is in effect one contract; and though beyond all doubt this court could not interfere to enforce the specific performance of the whole of this contract, yet in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion, that if she had attempted, even in the absence of any negative stipulation to perform at another theatre, she would have broken the spirit and true meaning of the contract as much as she would now do with reference to the contract into which she has actually entered.

Wherever this court has not proper jurisdiction to enforce specific performance, it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing at any other theatre while this court had no power to compel her to perform at Her Majesty's Theatre. It is true, that I have not the means of compelling her to sing, but she has no cause of complaint, if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfil her engagement. The jurisdiction which I now exercise is wholly within the power of the court, and being of opinion that it is a proper case for interfering, I shall leave nothing unsatisfied by the judgment I pronounce. The effect too of the injunction, in restraining J. Wagner from singing elsewhere may, in the event of an action being brought against her by the plaintiff, prevent any such amount of vindictive damages being given against her as a jury might probably be inclined to give if she had carried her talents and exercised them at the rival theatre: the injunction may also, as I have said, tend to the fulfilment of her engagement; though, in continuing the injunction, I disclaim doing indirectly what I cannot do directly.

Referring again to the authorities, I am well aware that they have not been uniform, and that there undoubtedly has been a difference of decision on the question now revived before me; but, after the best consideration which I have been enabled to give to the subject, the

conclusion at which I have arrived is, I conceive, supported by the greatest weight of authority. The earliest case most directly bearing on the point is that of Morris *v.* Colman: there Mr. Colman was a part proprietor with Mr. Morris of the Haymarket Theatre, and they were partners in that concern, and by the deed of partnership Mr. Colman agreed that he would not exercise his dramatic abilities for any other theatre than the Haymarket; he did not, however, covenant that he would write for the Haymarket, but it was merely a negative covenant that he would not write for any other theatre than the Haymarket. Lord Eldon granted an injunction against Mr. Colman writing for any other theatre than the Haymarket; and the ground on which Lord Eldon assumed that jurisdiction was the subject of some discussion at the bar. It was truly said for the defendants that that was a case of partnership; and it was said, moreover, that Lord Cottenham was mistaken in the case of Dietrichsen *v.* Cabburn, when he said that Lord Eldon had not decided Morris *v.* Colman on the ground of there being a partnership. I agree that the observations which fell from Lord Eldon in the subsequent case of Clarke *v.* Price, show that he did mainly decide it on the ground of partnership; but he did not decide it exclusively on that ground. In the argument of Morris *v.* Colman, Sir Samuel Romilly suggested a case almost identical with the present: he contended that the clause restraining Mr. Colman from writing for any other theatre was no more against public policy than a stipulation that Mr. Garrick should not perform at any other theatre than that at which he was engaged would have been. Lord Eldon, adverting in his judgment to the case put at the bar, said: "If Mr. Garrick was now living, would it be unreasonable that he should contract with Mr. Colman to perform only at the Haymarket Theatre, and Mr. Colman with him to write for the theatre alone? Why should they not thus engage for the talents of each other?" He gives the clearest enunciation of his opinion, that that would be an agreement which this court would enforce by way of injunction.

The late Vice-Chancellor Shadwell, of whom I always wish to be understood to speak with the greatest respect, decided in a different way, in the cases of Kemble *v.* Kean and Kimberley *v.* Jennings, on which I shall presently make a few observations. In the former case, he observed that Lord Eldon must be understood, in the case of Morris *v.* Colman, to have spoken according to the subject-matter before him, and must there be considered to be addressing himself to a case in which Colman and Garrick would both have had a partnership interest in the theatre. I must, however, entirely dissent from that interpretation. Lord Eldon's words are perfectly plain; they want no comment upon them; they speak for themselves. He was alluding to a case in which Garrick, as a performer, would have had nothing to do with the theatre beyond the implied engagement that he would not perform anywhere else; and I have come to a very clear conclusion that Lord Eldon would have granted the injunction in that case, although there had been no partnership.

The authority of Clarke *v.* Price was much pressed upon me by the learned counsel for the defendants; but that is a case which does not properly belong to their argument, because there there was no negative stipulation, and I quite admit that this court cannot enforce the performance of such an affirmative stipulation as is to be found in that case; there the defendant having agreed to take notes of cases in the Court of Exchequer, and composed reports for the plaintiff, and having failed to do so, the plaintiff, Mr. Clarke, filed a bill for an injunction, and Lord Eldon, when refusing the injunction, in effect said, I cannot compel Mr. Price to sit in the Court of Exchequer and take notes and compose reports; and the whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no covenant, on the part of the defendant, that he would not compose reports for any other person. The expressions in the judgment are: "I cannot, as in the other case" [referring to Morris *v.* Colman], "say that I will induce him to write for the plaintiff by preventing him from writing for any other person;" and then come these important words: "for that is not the nature of the agreement." Lord Eldon therefore was of opinion, upon the construction of that agreement, that it would be against its meaning to affix to it a negative quality and import a covenant into it by implication, and he therefore, very properly as I conceive, refused that injunction; that case, therefore, in no respect touches the question now before me, and I may at once declare, that if I had only to deal with the affirmative covenant of the defendant J. Wagner that she would perform at Her Majesty's Theatre, I should not have granted any injunction.

Thus far, I think, the authorities are very strong against the defendants' contention; but the case of Kemble *v.* Kean, to which I have already alluded, is the first case which has in point of fact introduced all the difficulties on this part of the law. There Mr. Kean entered into an agreement precisely similar to the present: he agreed that he would perform for Mr. Kemble at Drury Lane, and that he would not perform anywhere else during the time that he had stipulated to perform for Mr. Kemble. Mr. Kean broke his engagement, a bill was filed, and the Vice-Chancellor Shadwell was of opinion that he could not grant an injunction to restrain Mr. Kean from performing elsewhere, which he was either about to do or actually doing, because the court could not enforce the performance of the affirmative covenant that he would perform at Drury Lane for Mr. Kemble. Being pressed by that passage which I have read from in the Lord Chancellor's judgment in Morris *v.* Colman, he put that paraphrase or commentary upon it which I have referred to; that is, he says: "Lord Eldon is speaking of a case where the parties are in partnership together." I have come to a different conclusion; and I am bound to say that, in my apprehension, the case of Kemble *v.* Kean was wrongly decided and cannot be maintained.

The same learned judge followed up his decision in that case in the

subsequent one of Kimberley *v.* Jennings;[1] that was a case of hiring and service, and the Vice-Chancellor there virtually admitted that a negative covenant might be enforced in this court, and quoted an instance to that effect within his own knowledge. He said: "I remember a case in which a nephew wished to go on the stage, and his uncle gave him a large sum of money in consideration of his covenanting not to perform within a particular district; the court would execute such a covenant, on the ground that a valuable consideration had been given for it." He admits therefore the jurisdiction of the court, if nothing but that covenant remained to be executed. The learned judge, however, adds, "but here the negative covenant does not stand by itself: it is coupled with the agreement for service for a certain number of years, and then for taking the defendant into partnership: . . . this agreement cannot be performed in the whole, and therefore this court cannot perform any part of it." Whatever may have been the mutual obligations in that case, which prevented the court from giving effect to the negative covenant, I am not embarrassed with any such difficulties here, because, as I have already shown, both the covenants are on the part of the defendants.

The case of Hooper *v.* Brodrick[2] was cited, as an instance in which the court had refused an injunction under circumstances like the present; but, in that case, the lessee of an inn had covenanted to use and keep it open as an inn during a certain time, and not to do any act whereby the license might become forfeited. In point of fact the application was that he might be compelled to keep it open, and the Vice-Chancellor makes this observation: "The court ought not to have restrained the defendant from discontinuing to use and keep open the demised premises as an inn, which is the same in effect as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing, or causing or permitting to be done, any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises. It is not, however, shown that the defendant has threatened, or intends to do, or to cause or permit to be done, any act whereby the licenses may become forfeited or be refused; and therefore the injunction must be dissolved." That therefore is an authority directly against the defendants, because it shows that if there had been an intention to break the negative covenant this court would have granted the injunction.

The case of Smith *v.* Fromont[3] was also relied upon by the defendants, as an instance where the injunction had been refused, but there there was no negative covenant; it was an attempt to restrain, by injunction, a man from supplying horses to a coach for a part of a road, when the party who was applying for the injunction was himself incapable of performing his obligation to horse his part of the road. Lord Eldon, in refusing the injunction and deprecating the interference of the court in such cases, there said: "The only instance I recollect of an application to this court to restrain the driving of coaches

[1] 6 Sim. 340. [2] 11 Sim. 47. [3] 2 Swanst. 330

occurred in the case of a person who, having sold the business of a coach proprietor from Reading to London, and undertaking to drive no coach on that road, afterwards established one. With some doubt, whether I was not degrading the dignity of this court by interfering, I saw my way in that case; because one party had there covenanted absolutely against interfering with the business which he had sold to the other." That again is a direct authority, therefore, against the defendants, as Lord Eldon expressly says he had interfered in the case of a negative covenant, although he could not interfere on that occasion because there was no such covenant.

Some observations have been made upon a decision of my own in Ireland, in the case of Gervais *v.* Edwards;[1] that decision I believe to be right, but it is quoted to show that I was of opinion that this court cannot interfere to enforce specific performance, unless it can execute the whole of an agreement. I abide by the opinion I there expressed, and I mean to do nothing in this case which shall in any manner interfere with that opinion. That was properly a case for specific performance, but from the nature of the contract itself there was a portion of it which could not be executed. I said, in effect: I cannot execute this contract which is intended to be binding on both parties; I cannot execute a portion of this contract for one, and leave the other portion of the contract unexecuted for the other; and, therefore, as I cannot execute the whole of the contract, I am bound to execute no part of it: that, however, has no bearing on the present case, for here I leave nothing unperformed which the court can ever be called upon to perform.

In Hills *v.* Croll, Lord Lyndhurst refused to enforce an injunction to restrain the violation of a negative covenant. It was a case in which A. had given to B. a sum of money, and B. covenanted that he would buy all the acids he wanted from the manufactory of A., who covenanted that he would supply the acids, and B. also covenanted that he would buy his acid from no other person. Lord Lyndhurst refused to prohibit B. from obtaining acids from any other quarter, both because the covenants were correlative, and because he could not compel A. to supply B. with acids; and if, therefore, he had restrained B. from taking acids from any other quarter, he might have ruined him in the event of A. breaking his affirmative covenant to supply the acids. That case has never been rightly understood. It is supposed that Lord Lyndhurst's decision was based upon a wrong principle; that he followed the authority of Gervais *v.* Edwards and such cases, and that he improperly applied the rule, which was in that class of cases properly applied, but under the circumstances of the case before him I think the rule was not improperly applied.

The next case which has been so much observed upon was that, before Lord Cottenham, of Dietrichsen *v.* Cabburn. That was a very simple case, and the question upon what principle it was decided, formed the subject of discussion before me. A man, in order to obtain a

[1] 2 Dru. & War. 80.

great circulation of his patent medicine, entered into a contract with a vendor of such articles, giving him a general agency for the sale of the medicine, with 40 per cent. discount, and stipulating that he would not supply anybody else at a larger discount than 25 per cent.; he violated his contract and was proceeding to employ other agents with a larger discount than 25 per cent.; an injunction was applied for and was granted: it was said that it was properly granted, because it was a case of partnership. This, however, was not the fact; it was not a case of partnership, but was strictly one of principal and agent; and it was only because there was the negative covenant that the court gave effect to it. It is impossible to read Lord Cottenham's judgment without being satisfied that he did not consider it to be a partnership, though he said it was in the nature of a partnership; and in a popular sense it might be so called, because the parties were there both dealing with respect to the same subject, from which each was to have a benefit, but in no legal sense was it a partnership.

Up to the period when Dietrichsen *v.* Cabburn was decided, I apprehend that there could have been no doubt on the law as applicable to this case, except for the authority of Vice-Chancellor Shadwell; but with great submission it appears to me that the whole of that learned judge's authority is removed by himself by his decision in the later case of Rolfe *v.* Rolfe.[1] In that case A., B., and C. were partners as tailors. A. and B. went out of the trade on consideration of receiving 1000*l.* each, and C. was to continue the business on his own account. A. entered into a covenant that he would not carry on the trade of a tailor which he had just sold, within certain limits, and C. entered into a covenant that he would employ A. as cutter at a certain allowance. The bill was filed simply for an injunction to prevent A. from setting up as a tailor within the prescribed limits, and the Vice-Chancellor granted that injunction. It was objected that this court could not grant the injunction when there was something remaining to be performed, for that A. had a right to be employed as a cutter, which right this court would not even attempt to deal with or enforce as against C. That case therefore was open to a difficulty which does not occur here; in fact the same difficulty which might have arisen in Hills *v.* Croll before Lord Lyndhurst. But the Vice-Chancellor held that to be no difficulty at all, observing that the bill simply asked for an injunction which he would grant; although he could not give effect to the affirmative covenant to do the act in respect of which no specific performance was asked: his own decisions in Kemble *v.* Kean, and in Kimberley *v.* Jennings,[2] were pressed upon him; but he observed "that the bills in the cases cited asked for specific performance of the agreement, and that the injunctions were sought as only ancillary to that relief; but the bill in the present case asked merely for an injunction." He no longer put it on the inability of the court to enforce a negative covenant, but he put it on the form of the pleadings. Whether that form was

[1] 15 Sim. 88.

[2] 6 Sim. 340.

sufficient to justify his opinion is a question with which I need not deal; but I am very clearly of opinion that the case of Rolfe *v.* Rolfe [1] does remove the whole weight of that learned judge's authority on this subject.

It was said in argument that the injunction prayed in Rolfe *v.* Rolfe was merely ancillary to the relief; but it will be seen that that was not so, and that the prayer extended only to the injunction, and had nothing to do with relief in the shape of specific performance; and the learned judge himself stated that, if it had gone to that extent, he, following his former decisions, would not have granted the injunction.

From a careful examination of all these authorities I am of opinion that the principles and rules deducible from them are in direct contravention of those principles and rules which were so elaborately pressed upon me during the argument; and I wish it to be distinctly understood that I entertain no doubt whatever that the point of law has been properly decided in the court below.[2] [3]

DE MATTOS *v.* GIBSON.

IN CHANCERY, before LORD CHELMSFORD, C., MAY 27, 1859.

[4 *DeGex & Jones*, 276.]

BY a charter-party dated the 23d of October, 1857, between the defendant, H. T. Curry, owner of the Allerton, and the plaintiff, it was agreed that the Allerton should load a cargo of coals at one of the collieries in the river Tyne and proceed to Suez and deliver the same. On the 12th of January, 1858, Curry mortgaged the vessel to the defendant Gibson to secure a sum of 1500*l.*, Gibson having full notice of the charter-party.

[1] 15 Sim. 88.

[2] The injunction, issued by Sir James Parker, V. C., restrained the defendant Wagner from singing at any other theatre than the plaintiff's and the defendant Gye from accepting the professional services of the defendant Wagner during the existence of contract with the plaintiff. — ED.

[3] The doctrine of Lumley *v.* Wagner has been followed or extrajudicially approved in the following cases: Johnson *v.* Shrewsbury, 3 D. M. & G. 914, 927; Fechter *v.* Montgomery, 33 Beav. 22 *semble*); Mapleson *v.* Bentham, 20 W. R. 176; Singer Co. *v.* Union Co., 1 Holmes, 255, 257; McCaull *v.* Braham, 16 Fed. R. 37; Metropolitan Co. *v.* Ewing, 42 Fed. R. 198 (*semble*); Caldwell *v.* Cline, 8 Mart. N. S. 684 (*semble*); Peabody *v.* Norfolk, 98 Mass. 452, 461; Young Co. *v.* Bromley Co., (N. J. Eq.) 34 Atl. R. 947 (*semble*); Mowers *v.* Fogg, 45 N. J. Eq. 120 (*semble*); Duff *v.* Russell, 60 N. Y. Super. Ct. R. 80 (affirmed in 133 N. Y. 678); Fredericks *v.* Mayer, 1 Bosw. 227 (*semble*); Butler *v.* Galletti, 21 How. Pr. 455 (*semble*); Daly *v.* Smith, 38 N. Y. Super. Ct. 158; De Pol *v.* Solke, 7 Robt. N. Y. 289 (*semble*): Metropolitan Co. *v.* Ward, 9 N. Y. Sup. 779 (*semble*); Hayes *v.* Willio, 11 Abb. Pr. N. S. 167; Arena Club *v.* McPartland, 41 N. Y. Ap. Div. 208 (*semble*); Pratt *v.* Montegriffo, 25 Abb. N. C. 334; Canary *v.* Russell, 9 N. Y. Misc. Rep. 558; Port Clinton Co. *v.* Cleveland Co., 13 Oh. St. 544, 552; Columbus Club *v.* Reiley, 25 Oh. W. L. Bull. 385 *semble*.; Cert *v.* Lassard, 18 Oreg. 221 (*semble*); Phila. Club *v.* Hallman, 20 Phila. 276 (*semble*); American Ass'n *v.* Pickett, 8 Pa. Co. Ct. R. 232.

See Hahn *v.* Concordia Society, 42 Md. 460, 464. — ED.

The vessel met with bad weather in the Channel and was obliged to put into Penzance for repairs, at which port she was when the bill was filed. Gibson threatened to sell the vessel under his power of sale without reference to her engagement under the charter-party.

The prayer of the bill was, that it might be declared that the charter-party of the 23d of October, 1857, ought to be specifically performed, and that the defendant Curry might be decreed to perform it accordingly, the plaintiff submitting to perform the same on his part, and that an injunction might be granted to restrain Curry from permitting the vessel and cargo to remain at Penzance or any place other than Suez, and also for an injunction against the defendant Gibson in the terms stated at the beginning of the case.[1]

The Lord Chancellor. The charter-party is merely a contract for the conveyance to Suez of a cargo of coals for the plaintiff, leaving Curry the complete ownership of the vessel, but subject to an engagement to carry the coals and to deliver them at their place of destination. His engagement under the charter-party is one of which he cannot divest himself by the transfer of the vessel, nor would the assignment of the property in the vessel transfer to the assignee either the benefit or the obligation of the stipulation in the charter-party except through him. Gibson as the mortgagee, though with full notice of the charter-party, incurred no liability in respect of the contract with the plaintiff, nor was he bound to do anything to forward its performance.

But assuming that Curry had shown no disposition to fulfil his contract, but had passively permitted the vessel to remain unrepaired and in a state in which her further prosecution of the voyage was out of the question, is the plaintiff entitled to resort to a court of equity to compel a specific performance of the charter-party?

A contract of this kind consists of various stipulations, as to many of which it is beyond the power of the court to enforce performance. The vessel must be in a fit state to perform the voyage; she must be provided with a skilful master and a competent crew; she must be found in all things necessary, and she must commence and pursue her voyage with reasonable dispatch and without deviation. How can the court decide upon the skill of the master, the competency of the crew, or the sufficiency of the vessel, so as to compel the observance of the contract in all these particulars?

So far therefore as Curry is concerned, who has been merely guilty of omission, and has done nothing actively to hinder the voyage, the bill cannot be maintained either to enforce specific performance of the charter-party, or to restrain him from permitting the vessel to remain at Penzance or any other place than Suez, which is, in other words, to require him to perform the voyage, and to do all acts which are necessary to put the vessel in a seaworthy state for the purpose. We may, therefore, confine our attention entirely to the case of Gibson, and to

[1] The statement of the case is condensed, and only a portion of Lord Chelmsford's judgment is given. — Ed.

the relief which is prayed against him. Ought the court, under all the circumstances, to interfere to restrain him from exercising his rights under his mortgage, and thereby preventing the performance of the contract by Curry?

I will first of all consider what the case would have been as against Curry, if he himself, instead of remaining passive, had done or threatened to do some act which would have been a breach of his engagement to employ the vessel in the plaintiff's service. Could the court have restrained him, and so, indirectly perhaps, have compelled him to perform his contract?

It is said that there was no negative stipulation in the charter-party which could be thus enforced, for that there was nothing to prevent Curry carrying coals in his vessel for other persons; but I agree with Vice-Chancellor Wood's view of the case of Webster *v.* Dillon,[1] that affirmative agreements may involve a negative; and when by this charter-party Curry undertakes to carry to Suez a full and complete cargo of coals for the plaintiff, it necessarily implies that if the plaintiff provides a full cargo, the vessel shall not be employed for any other person or purpose. It is also said that any other vessel will carry the plaintiff's coals just as well as the Allerton, that the charter is a mere contract to deliver goods at a certain time and place, and that Lord Cottenham, in Heathcote *v.* The North Staffordshire Railway Company,[2] puts this very case as one in which the court will not interfere.

But it seems to me that these arguments are not well founded. A person who hires a vessel under a charter-party does so not merely from a wish to have his goods conveyed to a particular place, but upon a careful choice of the vessel itself as best adapted for his purposes. Many considerations may influence him in the selection, and after these have determined him to bind himself and the owner of a particular vessel in a contract for its employment, he would be surprised to be told that all he wanted was to have his goods conveyed to their destination, and that it was immaterial to him in what manner, or by what conveyance this was accomplished. I think that a vessel engaged under a charter-party ought to be regarded as a chattel of a peculiar value to the charterer, and that although a court of equity cannot compel a specific performance of the contract which it contains, yet that it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden, according to the principle so fully expressed in the case of Lumley *v.* Wagner. In such cases the court repudiates the idea of indirectly compelling performance where it could not directly decree it. It gives all the relief in its power, without looking to the effect which may be ultimately produced by the restraint which it places on the party who is disposed to break his contract.

I have no doubt that the plaintiff would have been entitled to the interference of the court to this extent, if the case had been the one

[1] 3 Jur. N. S. 432. [2] 2 Mac. & G. 112.

supposed, of Curry attempting to employ the vessel in a manner not in accordance with the terms of the charter-party. But Gibson's position is entirely different from Curry's. He is not bound by any engagement to the plaintiff. It is true that he took his mortgage with a full knowledge of the charter, and that he must therefore abstain from any act which would have the immediate effect of preventing its performance. If for instance, when the vessel put into Penzance, and before a reasonable time for Curry's doing the repairs had elapsed (supposing his power of sale to have been then available), he had determined to exercise it, expressly declaring that he meant to conceal the charter from the purchaser, or much more certainly if he had endeavored to hinder the voyage by sending the vessel in a different direction, I think that he might have been restrained from doing such acts as these by injunction. But Gibson has not in any way interfered with the performance of the charter-party until it was evident that Curry was wholly unable to perform it.

I think that, under these circumstances, it would be most unjust to restrain Gibson from availing himself of any rights which his possession of the vessel and his title as mortgagee have enabled him to exercise.

I am of opinion that the Vice-Chancellor's decree must be affirmed and the appeal dismissed with costs.

MONTAGUE *v.* FLOCKTON.

IN CHANCERY, BEFORE SIR R. MALINS, V. C., MAY 26, 1873.

[*Law Reports*, 16 *Equity*, 189.]

THIS was a motion on behalf of the plaintiff, Henry James Montague, the lessee and manager of the Globe Theatre in London, for an injunction to restrain the defendant, Charles Poston Flockton, from acting, or causing his name to be advertised as about to act, at any place other than the plaintiff's theatre, or otherwise than for the plaintiff's benefit, for a period of nine months, from the 2d of October, 1872, and in particular from acting at an intended dramatic performance at the Crystal Palace.[1]

SIR R. MALINS, V. C. The effect of the agreement between the parties is that Mr. Flockton has bound himself for the whole of the season which commenced in October last for nine months, which, on the one hand, obliges Mr. Montague to pay him his salary for nine months, and obliges Mr. Flockton, on the other hand, to perform for Mr. Montague for the same period. It is said, in order to avoid this, that he is not bound, because there is no negative stipu-

[1] The rest of the statement of the case, the arguments, and a part of the judgment in which the Vice-Chancellor discussed the meaning of the contract are omitted. — ED.

lation in the contract. I certainly am under the impression that in the case of Lumley *v.* Wagner, if there had been no negative stipulation the court would have interfered; and I gather this particularly from the passage in Lord St. Leonard's judgment, where he says: "The agreement to sing for the plaintiff during three months at his theatre, and during that time not to sing for anybody else, is not a correlative contract; it is, in effect, one contract, and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theatre must necessarily exclude the right to perform at the same time at another theatre." It happened that that contract did contain a negative stipulation, and, finding it there, Lord St. Leonards relied upon it; but I am satisfied that if it had not been there he would have come to the same conclusion, and granted the injunction, on the ground that Mdlle. Wagner, having agreed to perform at Mr. Lumley's theatre, could not at the same time be permitted to perform at Mr. Gye's. But however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point. It appears to me, on the plainest ground, that an engagement to perform for nine months at Theatre A. is a contract not to perform at Theatre B., or at any other theatre whatever. How is a man to perform his duty to the proprietor of a theatre if, when he has engaged himself to perform for him, he is to go away any night that he may be wanted to another theatre? I must treat Mr. Flockton as if he were the greatest actor in the world, and as if wherever he went the public would run after him; and according to this, if a proprietor engages an actor to perform for him, he is not, because he is only wanted for three nights in the week, to be at liberty to go and perform at any other theatre during the other three nights, and thereby take away the advantage of the contract which he has entered into with his employer. That, in my opinion, is utterly inconsistent with the proper construction of the contract. There is no doubt whatever that the proper construction of these contracts is, that where a man or woman engages to perform or sing at a particular theatre for a particular period, that involves the necessity of his or her not performing or singing at any other during that time.

That does not rest upon my opinion only, because it was acted upon in Webster *v.* Dillon.[1] In that case there was, it seems, no argument on the part of the defendant. I suppose they did not argue it because they found they could make nothing of it. The defendant Dillon, an actor, having agreed to perform at Sadler's Wells Theatre in certain characters for twelve successive nights, proposed to perform during the same period at another theatre. Mr. Swanston applied for the injunction, and Vice-Chancellor Sir W. Page

[1] 3 Jur. (N. S.) 432.

Wood "thought the words of Lord St. Leonards were sufficiently strong to justify his making the order, and he granted an injunction restraining the defendant from acting at any other place than the plaintiff's theatre during the ordinary hours of performance there of twelve consecutive nights, commencing on the 20th of April, the plaintiff undertaking to abide by such order as to damages as the court might direct." He fully adopts there the principle that it is not necessary to have a negative covenant in order to prevent the performance at another theatre. In Fechter *v.* Montgomery [1] I think all men must concur in the reasonableness of the views of the Master of the Rolls. Mr. Fechter had engaged Mr. Montgomery, who had been a provincial actor, and desired to appear on the London boards to perform Shakespeare's characters, and Mr. Fechter had kept Mr. Montgomery for five months idle, but he paid him his salary. Mr. Montgomery's object was to be occupied; he did not want to be kept idle, he wanted to shew his talents to London audiences, and it being clear that Fechter had kept him five months perfectly idle, and, for all that appeared, was likely to keep him idle for another five months, Mr. Montgomery would not submit to it, and broke his engagement. Mr. Fechter then filed a bill for an injunction, and in my opinion the Master of the Rolls could not have come to any other conclusion than that Mr. Fechter had broken his part of the contract, and therefore he would not enforce it as against Montgomery. The contract there did not contain any negative stipulation that he would not perform except for Mr. Fechter. The Master of the Rolls in that case says: [2] "But having regard to the situation of the parties, having regard to the nature of a contract of this description, and having regard also to the previous letter of the 21st of June, 1862, written to Mr. Barnett, and the conversation which took place prior to this agreement being entered into, with respect to which conversation there does not appear to me to be much difference on either side, I am of opinion that it was an agreement entered into by Mr. Fechter to employ Mr. Montgomery, during a reasonable time, to act at this theatre, and that it was an agreement on the other side that he (Mr. Montgomery) should not perform elsewhere without the consent of Mr. Fechter; there was a mutuality in the agreement entered into on both sides; on the one side, that he should have an opportunity of displaying what his abilities and talents were before a London audience, and on the other side, that he should not act elsewhere unless with the permission of the plaintiff." There are, therefore, Sir W. Page Wood, when vice-chancellor, and the Master of the Rolls, Lord Romilly, taking precisely the same view, that an engagement to act at one theatre is a prohibition against acting at any other. There is also the whole principle involved in the case of De Mattos *v.* Gibson, which was with regard to a totally different subject undoubtedly, namely, the chartering of a ship. The ship was chartered for a particular voyage, and the charterer proposed to sell her, and employ her

[1] 33 Beav. 22. [2] 33 Beav. 26.

in a totally different manner. There the court decided that there was a contract that she should not be employed for any other purpose, and granted an injunction against her being so employed accordingly. I think, therefore, that it is decidedly established, and I should desire, as far as my opinion is of value on the subject, that it should be considered my opinion, that a man agreeing to act in one particular theatre during the season is party to a contract that he will act there and not anywhere else. A negative contract is as necessarily implied as if it had been plainly expressed. Then the result is: here is a contract entered into for value. It is said by Mr. Flockton that the plaintiff has refused to perform his part of the contract, and has also refused to allow him to perform. That is explained in the affidavits. It is not attempted to be answered. It is perfectly clear that, in consequence of Flockton having absented himself, and given the notice of the 2d of October, when this new piece was about to be brought out, Mr. Montague was obliged to apply to another actor, a Mr. Palmer, to act in the place of Mr. Flockton, and that, in consequence of the default of Mr. Flockton to perform his contract, he has brought this trouble upon himself.

I am, therefore, of opinion that Mr. Montague is entitled to the injunction.[1]

DIETRICHSEN *v.* CABBURN.

IN CHANCERY, BEFORE LORD COTTENHAM, C., JULY 20, 1846.

[2 *Phillips*, 52.]

THIS was an appeal from an order of the Vice-Chancellor of England, allowing a general demurrer to the bill.

The bill stated that the plaintiff was an extensive vendor of patent medicines, and that, from the extent of his business, he had, at the date of the agreement after mentioned, great facilities by advertisement on his wrappers, etc., of giving publicity to the medicines sold by him. That the defendant having, in 1840, discovered a receipt for a particular medicine called Cabburn's Antidoloric Oil, he applied to the plaintiff to be his wholesale agent for the sale of it, and that thereupon an agreement in writing was entered into between them, dated 1st October, 1840, whereby the defendant agreed for twenty-one years to employ the plaintiff as his wholesale agent for the sale of the

[1] Webster *v.* Dillon, 3 Jur. N. S. 432 (*semble*); Fechter *v.* Montgomery, 33 Beav. 22 (*semble*); Western Co. *v.* Union Co., 3 Fed. R. 423 (*semble*); Taunton Co. *v.* Cook (Before Hoar, J., Massachusetts, 1861), 24 Bost. L. Rep. 547; Duff *v.* Russell, 60 N. Y. Super. Ct. R. 80, affirmed in 133 N. Y. 678; Lacy *v.* Henck (Cincinnati Super. Ct. 1884), 9 Oh. Dec. 347, 12 W. L. Bull. 209 s. c.; Hoyt *v.* Fuller, 19 N. Y. Sup. 962; Cort *v.* Lassard, 18 Oreg. 221, 226 (*semble*); American Ass'n *v.* Pickett, 8 Pa. Co. Ct. R. 232 *Accord*.

Butler *v.* Galletti, 21 How. Pr. 465; Delavan *v.* Macarte (Hamilton Co., Ohio, Com. Pleas, 1847), 4 West. L. J. 555 *Contra*.

See Burney *v.* Ryle, 91 Ga. 295; Hahn *v.* Concordia Society, 42 Md. 460. — ED.

oil, and to supply him with such quantities as he should order, at 40*l.* per cent. discount upon the current retail price, and that he would not, during that period, supply or sell any of the oil to any other person, for the purpose of selling it again, at a larger discount than 25*l.* per cent. upon such retail price. And in consideration of that agreement on the part of the defendant, the plaintiff agreed to continue to act as the wholesale agent of the defendant, and to pay for the oil supplied to him every three months at the price aforesaid.

The bill then stated that although the plaintiff in all respects had performed the agreement on his part, the defendant had supplied divers medicine dealers with large quantities of the oil at a higher rate of discount than 25*l.* per cent.; and it prayed an injunction, and an account of the profits realized by the defendant from the sales already made by him in violation of the agreement.[1]

The Lord Chancellor. The question is, does the bill state a case coming within the jurisdiction of the court? The allowance of the demurrer assumes that it does not; and the ground stated (for I have not had the benefit of seeing a note of the Vice-Chancellor's judgment), is, that the court will not prohibit the violation of a negative term in an agreement, unless it has the power of enforcing the positive part of the same agreement.

I cannot but think that there has been some misapprehension of the meaning of the Vice-Chancellor, as applied to this supposed rule: for in the case of Kimberley *v.* Jennings [2] his honor, in stating that a violation of a negative term in an agreement will not be restrained in cases in which the positive part of the agreement cannot be enforced, exemplifies it by saying, that, if the agreement cannot be performed in the whole, the court cannot perform any part of it. To the proposition so explained,[3] I entirely assent; for it is only applying a well-known rule in cases of specific performance, of which an injunction is in many cases the instrument, and amounts only to this, that if there be such an infirmity in the agreement, that it cannot be performed in all its parts, the court will not by an injunction compel the defendant to perform his part of it: and this view of his honor's opinion is confirmed by the case he put, of a consideration actually paid for a negative agreement, in which case he says that an injunction would be granted. I cannot see any difference between a consideration actually paid, and a performance alleged by the plaintiff of all that he had undertaken to do.

The equitable jurisdiction to restrain by injunction an act which the defendant by contract or duty was bound to abstain from, cannot be confined to cases in which the court has jurisdiction over the acts of the plaintiff; for if that were so, it could not interfere to restrain the violation of contracts by tenants, or of duty by agents, as in the

1 The statement is abridged and the arguments and a small portion of the judgment are omitted. — Ed.

2 6 Sim. 340.

3 The Lord Chancellor, it is conceived, is here referring to an agreement which is not mutual.

case of Yovatt v. Winyard [1] and Green v. Folgham,[2] or by an attorney, as in Cholmondeley v. Clinton,[3] in none of which cases was there anything to be done by the plaintiff which equity could enforce. Such, also, are cases of injunctions sought by tenants against their landlords, as Rankin v. Huskisson,[4] where there was a negative agreement, and Squire v. Campbell,[5] where one was attempted to be raised by the exhibition of a plan. In none of these was there any equity to be administered against the plaintiffs, and yet the jurisdiction was assumed; for although in the latter case the injunction was dissolved, that was because I thought no equity was raised by the alleged exhibition of plans, which I was of opinion could not be used for that purpose. The objection now suggested was not raised, or certainly was not the ground of the decision.

Similar to these are cases of injunction to protect legal rights, as patents, copyright, services to mills and others. There is no branch of the equitable jurisdiction requiring more discretion in the exercise of it, but certainly none more beneficial, than that of injunction; and I think that the doctrine contended for by the respondent would tend greatly to limit its sphere of action, and deprive many of the benefit of it, whose interests require it as much as others.

If the bill states a right or title in the plaintiff to the benefit of the negative agreement of the defendant, or of his abstaining from the contemplated act, it is not, as I conceive, material whether the right be at law or under an agreement which cannot be otherwise brought under the jurisdiction of a court of equity. In Martin v. Nutkin[6] an injunction was granted to restrain the ringing of a church bell, the plaintiff having put a clock in the church in consideration that the bell should not be rung at five in the morning. In Barrett v. Blagrave,[7] the proprietor of Vauxhall Gardens obtained an injunction to restrain the lessee of a public house in the neighborhood from selling liquors during the time the gardens were open, in violation of his covenant; and, although the injunction was dissolved[8] upon the ground of acquiescence, no objection was made to the exercise of the jurisdiction for want of mutuality.

But I consider the doctrine promulgated by Lord Eldon in Morris v. Colman, and in Clarke v. Price, as conclusive upon this point. In the former case the defendant was restrained from writing for any other but the Haymarket Theatre, he having entered into an agreement to that effect; but in Clarke v. Price, there was not any such negative agreement, and that Lord Eldon states to be the ground of his refusing to interfere: if there had been, there cannot be a doubt that he would have granted the injunction. It has been said that Morris v. Colman was a case of partnership: Lord Eldon does not appear from the report to have proceeded upon any such ground. The present and other cases of the kind are in the nature of partnership,

[1] 1 J. & W. 394.
[2] 1 Sim. & St. 398.
[3] 19 Ves. 261.
[4] 4 Sim. 13.
[5] 1 My. & Cr. 459.
[6] 2 P. W. 266.
[7] 5 Ves. 555.
[8] 6 Ves. 104.

being a joint undertaking for the benefit of the plaintiff and the defendant; and it does not appear why cases of actual partnership should be more favored, in the exercise of the jurisdiction by injunction, than others.

It being clear that the court will interfere to restrain a departure from the contract of partnership, cases of partnership afford additional instances of the fact that the court is not confined to cases in which it has jurisdiction over the whole contract, the interposition of the court in cases of continuing partnerships having been in many cases considered as very limited.

Looking, therefore, to the whole range of cases in which the court interferes to prevent the breach of a negative agreement, I cannot find any ground for the argument contended for by the respondent: and seeing that the bill alleges sufficient to show that the plaintiff is entitled to the benefit of the negative agreement on the part of defendant, and that the defendant has violated that agreement, and will, if not restrained, continue to do so, I am of opinion, that a case is stated for the interposition of a court of equity, and that the demurrer ought to be overruled.

FOTHERGILL *v.* ROWLAND.

IN CHANCERY, BEFORE SIR G. JESSEL, M. R., NOVEMBER 4, 1873.

[*Law Reports*, 17 *Equity*, 132.]

THE bill prayed for an injunction to restrain the defendant, who had agreed to sell to the plaintiffs the whole of the get of the coal of the No. 3 seam of the Newbridge colliery at a fixed price for five years, from selling or disposing of any coal from that seam to any other person during the continuance of the contract with the plaintiff. The defendant demurred.[1]

SIR G. JESSEL, M. R. The question is one which I am sorry to have to decide against the plaintiffs. No honest man, whether on the bench or off it, can approve of the conduct of the defendants. The first defendant, Rowland, has entered into a contract *bona fide* for valuable considerations to sell a quantity of coal to be raised from his mine to the plaintiffs. He has received the advantages of the contract, and because coal has risen in value and he can get a better price elsewhere, he does not choose to perform his contract. Such conduct ought not to meet with the approval of anybody. Then the question I have to determine is, whether the plaintiffs have come to the right court to obtain that which the law will undoubtedly give them, namely, compensation in some shape or other for the loss they have sustained

1 The statement of the case is much condensed, and the arguments, as well as a small part of the judgment, are omitted. — ED.

by this breach of contract. It appears to me, as the law now stands, a court of equity cannot give them any relief.

The first question is, what is the contract for? In my view of the contract it is one for the sale of coals, that is, coals gotten, the get of coal, the severed chattel, and it has no relation whatever to a contract for real estate. That point really was not argued by Mr. Fry, although Mr. Marten did touch upon it. I think it must be assumed, therefore, to be a simple contract for the sale of a chattel of a very ordinary description not alleged to be a peculiar coal, or coal that cannot be got elsewhere. On the contrary, as I read the bill, there is coal that can be got elsewhere of the same description, only at a higher price. The result is that the plaintiffs will incur an amount of damage to be measured by the market price which they may have to pay for the coal of the same description as the coal agreed to be supplied by the defendant Rowland.

It is said, however, that, although you can ascertain the market price as regards all the past non-delivery, you cannot ascertain exactly the market price as to future deliveries. To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years (which is the case here, for there are three years unexpired of the contract), is to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practise on what is called the other side of Westminster Hall. There is never considered to be any difficulty in ascertaining such a thing, therefore I do not think it is a case in which damages could not be ascertained at law.

That being so, what is there to distinguish this from any ordinary contract for the sale of goods? We have been told it has some connection with the colliery. I suppose coals must necessarily have connection with a colliery, and it happens that the person who sold the coal to be produced from a given colliery was also at that time the owner of the colliery. I apprehend there is no difficulty about entering into a contract for the sale of coal coming from a particular colliery by persons not owners of that colliery; that is the common practice. The coals not being delivered, and there being no means of obtaining their delivery without compelling the defendant Rowland to raise them, it has been admitted before me that this is a contract of which you cannot obtain a specific performance in a court of equity.

Therefore any relief to be obtained by the plaintiffs in the shape of compensation must be obtained at law, and I do not understand that the plaintiffs, coming here for an injunction which they ask, are willing to abandon their claim to compensation at law in the shape of damages.

Then it is said, assuming this contract to be one which the court cannot specifically perform, it is yet a case in which the court will restrain the defendants from breaking the contract. But I have always felt, when at the bar, a very considerable difficulty in understanding the court on the one hand professing to refuse specific

performance because it is difficult to enforce it, and yet on the other hand attempting to do the same thing by a roundabout method. If it is right to prevent the defendant Rowland from selling coal at all — he not having stipulated not to sell coal, but having stipulated to sell all the coal he can raise to somebody who has promised valuable consideration — why is it not right to compel him to raise it and deliver it? It is difficult to follow the distinction, but I cannot find any distinct line laid down, or any distinct limit which I could seize upon and define as being the line dividing the two classes of cases — that is, the class of cases in which the court, feeling that it has not the power to compel specific performance, grants an injunction to restrain the breach by the contracting party of one or more of the stipulations of the contract, and the class of cases in which it refuses to interfere. I have asked (and I am sure I should have obtained from one or more of the learned counsel engaged in the case every assistance) for a definition. I have not only not been able to obtain the answer, but I have obtained that which altogether commands my assent, namely, that there is no such distinct line to be found in the authorities. I am referred to vague and general propositions — that the rule is that the court is to find out what it considers convenient, or what will be a case of sufficient importance to authorize the interference of the court at all, or something of that kind.

That being so, and not being able to discover any definite principle on which the court can act, I must follow what Lord St. Leonards says, in Lumley *v.* Wagner, is the proper conduct for a judge, in not extending this jurisdiction. I am not, however, entirely without assistance from authority, because it appears to me that this very case has been put, though only by way of illustration, by a very great judge, Lord Cottenham, in Heathcote *v.* North Staffordshire Railway Company,[1] where he says: "If A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing anything which may or can prevent him from so delivering the goods?" That is the exact case I have to deal with, because I have decided that the contract is a contract for the delivery of goods. Finding the *dictum* of Lord Cottenham express on the subject, and the plaintiffs' counsel not having been able to produce to me any authority in which there has been such an injunction granted on the sale of goods or any chattel, in a case in which specific performance could not be granted, I think I shall do right in following that authority; and I say, although I say it with much regret, that it is a case in which equity can afford no relief.

A petition of appeal was presented against this decision, but the case was compromised before it came to a hearing.

[1] 2 Mac. & G. 112.

DONNELL *v.* BENNETT.

In the Chancery Division, February 8, 1883.

[*Law Reports*, 22 *Chancery Division*, 835.]

By an agreement dated the 15th of December, 1882, and made between the plaintiff, J. Donnell, a manure manufacturer, of the one part, and Cormack, a fish curer and fish smoker, of the other part, it was agreed that Cormack should sell and that the plaintiff should buy all parts of fish not used by Cormack in his business of a fish curer and fish smoker at the price of 23*s.* per ton for the space of two years from the 31st of December, 1882; and in consideration thereof Cormack further agreed that he would not sell during the said space of two years any fish or parts of fish to any other manufacturer whatever; and the plaintiff further agreed that he would take and pay for all fish or parts of fish which Cormack should deliver to him at the said price of 23*s.* per ton delivered at the plaintiff's works.

It was admitted that the defendant never delivered any fish or parts of fish under the contract to the plaintiff, but that he entered into a contract with the defendant Bennett to deliver all the parts of fish which he did not require in his business to Bennett; it was also admitted that the plaintiff had suffered damage by this breach of contract, and that the defendant Bennett had paid Cormack considerable sums of money to induce him to break his contract with the plaintiff, in order that Bennett might obtain the substantial monopoly of all the refuse of fish in Grimsby or the neighborhood.

This was an action by the plaintiff against Bennett and Cormack as co-defendants asking for an injunction to restrain Cormack from selling any fish to Bennett or any other manufacturers except the plaintiff, and to restrain Bennett from buying any such fish from Cormack.[1]

Fry, J. The question which arises is by no means an easy one. It is difficult because of the state of the authorities upon the point. It appears to me that the tendency of recent decisions, and especially the cases of Fothergill *v.* Rowland and of the Wolverhampton and Walsall Railway Company *v.* London and North Western Railway Company,[2] is towards this view — that the court ought to look at what is the nature of the contract between the parties; that if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract whether it contain or does not contain a negative stipulation; but that if, on the other hand, the breach of the contract is properly satisfied by damages, then that the court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases.

[1] The arguments of counsel are omitted. — Ed.

[2] 16 Eq. 433.

But the question which I have to determine is not whether that ought to be the way in which the line should be laid down, but whether it has been so laid down by the authorities which are binding on me.

Now several cases have been cited by the plaintiff as authorities in favor of his contention. In the first place there is the case of Dietrichsen *v.* Cabburn, in which undoubtedly the court enforced by way of injunction a stipulation not to sell except in a particular manner, and there the whole contract was one which could not have been performed specifically by the court. Still more, in Lumley *v.* Wagner the court enforced by way of injunction a portion of a contract the whole of which could not have been enforced by way of specific performance; and Lord St. Leonards in considering that case discussed the question whether an injunction ought to be granted in some cases in which specific performance cannot be granted, and he determined that question plainly in the affirmative. He made these observations: "Wherever this court has not proper jurisdiction to enforce specific performance it operates to bind men's consciences, as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. The exercise of this jurisdiction has, I believe, had a wholesome tendency towards the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other; and although the jurisdiction is not to be extended, yet a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity." It is plain, therefore, that Lord St. Leonards did not adopt the view which has occurred to me as that towards which the more recent cases have been tending.

That is the way in which the direct authorities stand in cases in which there is a negative clause, and they appear to me to shew that in cases of this description where a negative clause is found, the court has enforced it without regard to the question whether specific performance could be granted of the entire contract.

Then it is said by Mr. Cozens-Hardy that in all those cases the negative contract enforced was but a part of a larger contract, and that it was a separable part of that larger contract, and that those cases do not apply to a case like the present, in which, as he suggests, the negative contract is co-extensive with the positive contract.

Upon that argument two inquiries arise. In the first place, is it true to say that the negative contract is in the present instance co-extensive with the positive? In my judgment it is not. The affirmative contract is that the vendor will sell all his fish refuse for two years to the purchaser. The negative contract is that during two years he will not sell any refuse fish to any other manufacturer whomsoever; leaving it open to him so far as regards the negative contract, either not to sell at all, or to sell to some person other than a manufacturer. But in the next place one must inquire whether the authorities sup-

port any such distinction as that which has been urged by Mr. Cozens-Hardy. It appears to me that they do not.

In Lumley *v.* Wagner the contract was that Mdlle. Wagner would sing three months at Her Majesty's Theatre in London. The negative contract was that she would not "use her talents at any other theatre, nor in any concert or reunion, public or private, without the written authorization of Mr. Lumley." It is quite true that the contract contains certain stipulations as to how many nights she should be required to sing, but it appears to me to be evident that the substantial contract, the affirmative contract, was that she would sing there for three months. Of course she could not be always singing, and therefore the contract must state necessarily some limits as to how often she was to sing, but when she did sing during the three months she was to sing at Her Majesty's Theatre; the negative terms were that during the three months she would not sing anywhere else than at Her Majesty's Theatre. It appears to me that those two contracts are substantially co-extensive. But further than that it is to be borne in mind that Lord St. Leonards does not dwell on the distinction which is now sought to be drawn, and so far as I am aware no trace of it is to be found in the earlier authorities.

But then comes the case of Catt *v.* Tourle[1] before the Lords Justices, in which Hills *v.* Croll[2] was referred to. Now Hills *v.* Croll was a case which contained an affirmative and negative contract, and Lord Justice Giffard expressly said that if that case is to be taken as laying down that the court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply. If it is taken as going that length, it is contrary to the case of Lumley *v.* Wagner, and must be considered as overruled.

It appears to me, therefore, that that point which has been urged upon me does not receive any sanction from the earlier authorities.

I have come to the conclusion, therefore, upon the authorities, which are binding upon me, that I ought to grant this injunction. I do so with considerable difficulty, because I find it hard to draw any substantial or tangible distinction between a contract containing an express negative stipulation and a contract containing an affirmative stipulation which implies a negative. I find it exceedingly difficult to draw any rational distinction between the case of Fothergill *v.* Rowland and the case now before me. But at the same time the courts have laid down that, so far as the decisions have already gone in favor of granting injunctions, the injunction is to go.

It appears to me that this case is within the earlier decisions, and although I should be far from sorry if the Court of Appeal were to take a different view, I think I am bound here by the authorities, and therefore I grant the injunction till the hearing of the cause.[3]

[1] Law Rep. 4 Ch. 654. [2] 2 Ph. 60.

[3] Jones *v.* North, 19 Eq. 426; Manchester Canal Co. *v.* Manchester Racecourse Co., 1901, 2 Ch. 37; Singer Co. *v.* Union Co., Holmes, 253; Chicago Co. *v.* New York Co., 24 Fed. R. 516; Banker Co. *v.* Stimson, 40 N. Y. St. Rep. 740 *Accord.* ~~19 Eq. 426~~

Bickford *v.* Davis, 11 Fed. R. 549 (*semble*) *Contra.*

WHITWOOD CHEMICAL CO. *v.* HARDMAN.

In the Court of Appeal, March 2, 1891.

[*Law Reports*, 1891, 2 *Chancery*, 416.]

Appeal from Mr. Justice Kekewich.

The plaintiff company having, under a license, an exclusive right within ten miles of its plant to work a patent for improvements in the carbonization of coal and coal shale, engaged the defendant as manager for the term of ten years. By the agreement the defendant was to give the whole of his time to the company's business and reside within two miles of the company's works. The agreement contains no negative contract by the defendant. Becoming dissatisfied the defendant was proposing to become a director in another company about to be formed for carbonizing coal. The bill alleged that the defendant had special opportunities for mastering the details of the patent processes. The defendant stated that the plaintiffs' process was widely known, and that he himself had gained his own skill and knowledge while with his brother the patentee.

The plaintiffs prayed that the defendant be restrained from setting up any business or making any engagement with any one but the plaintiffs, and in particular from having anything to do with any company or partnership formed for the purpose of carrying on a similar business to that of the plaintiffs.[1] Mr. Justice Kekewich granted an

In Manchester Canal Co. *v.* Manchester Racecourse Co., *supra*, the defendant had agreed to give to the plaintiff, upon the happening of a certain event, the first refusal of certain lands. The event happened, but the defendant, making only an illusory offer to the plaintiff, contracted to sell the lands to the Trafford Park Co., which had notice of the prior agreement with the plaintiff. The judgment of Farwell, J., restraining the defendant from selling the lands to any person without first offering them to the plaintiff at the price offered by the Trafford Co., was affirmed. The Court of Appeal said, on p. 50, through Williams, J.: "It seems, however, from the decision in Wilmott *v.* Barber,[1] that the Trafford Park Company could not obtain a decree for specific performance of a contract for sale and purchase of land, if that sale would be a breach of a prior contract with a third person; and it seems to us to follow that one ought to treat this case on the basis of an action to restrain a breach of a contract threatened to be carried out in pursuance of a subsequent contract by the defendant with a third person having full knowledge of the first contract. This seems to bring the case within the principle of Lumley *v.* Wagner. The contract here to give the canal company the 'first refusal' involves a negative contract not to part with the land to any other company or person without giving that first refusal. If the action had been brought against the racecourse company, the party to the contract, alone, the injunction asked for could not have been granted without affecting the rights and interests of the Trafford Park Company. They are necessary parties to the action, just as Mr. Gye was a necessary party to the action of Lumley *v.* Wagner, for to grant the injunction in that case was to prevent Miss Wagner from carrying out her contract to sing at Mr. Gye's opera-house; and if the defendant, thus brought in, comes and insists on his right to have the second contract carried out, we do not see why the injunction should not be granted against him.

"Heathcote *v.* North Staffordshire Ry. Co.[2] was cited to us to show that no injunction could be granted against the third person in such a case; but so it was cited in Lumley *v.* Wagner with the same object, yet Lord St. Leonards, nevertheless, granted the injunction against Mr. Gye." — Ed.

[1] The statement of the case is condensed, and the arguments, together with a portion of the concurring judgment of Kay, L. J., are omitted. — Ed.

[1] 15 Ch. D. 96.

[2] 2 Mac. & G. 100.

injunction restraining the defendant from giving less than the whole of his time to the company's business.

LINDLEY, L. J. . . . The object of the plaintiffs in this action is to obtain an injunction to restrain the defendant from doing that which he either is doing, or, according to the plaintiffs, is about to do. It is alleged against him that, in violation of the agreement that he should give the whole of his time to this company, he is either giving some of his time, or about to give some of his time, to a rival company; and the plaintiffs, very naturally, desire to stop that course of action on his part. They are not disposed to let him go before the end of the ten years; and they take the view that, without their consent, he is not at liberty to release himself from the obligations into which he has entered by the agreement, and, to that extent, they appear to me to be right enough. If he is committing a breach of the agreement, he is doing that which is wrong in point of law; but that is not the question. The question is as to the plaintiffs' remedy. Now there are various remedies. There is the remedy of dismissal, there is the remedy of an action at law, and there is the remedy by injunction. The plaintiffs are not disposed to avail themselves of the first two remedies. They do not want to dismiss the defendant, and they do not want to bring an action against him — they want an injunction. They asked the court below for an injunction in terms which are different from those in which the learned judge has granted it. Their motion was that the defendant might be restrained from setting up in business, or entering into any agreement or engagement with any person or company other than themselves, by which the whole of the defendant's time would cease to be devoted to their business, or by which the defendant would be prevented from carrying out his agreement with them. The question is, whether an injunction in those terms, or substantially in those terms, ought to be granted, having regard to the principles upon which the court acts in cases of this description. The first point to observe is, that there is no negative covenant at all, in terms, contained in the agreement on which the plaintiffs are suing — that is to say, the parties have not expressly stipulated that the defendant shall not do any particular thing. The agreement is wholly an affirmative agreement, and the substantial part of it is that the defendant has agreed to give "the whole of his time" to the plaintiff company. That is important in this respect, that it enables us to see more clearly than we otherwise might what the parties had in their contemplation. If there had been a negative clause in this agreement, such as there was in Lumley *v.* Wagner, and in some of the other cases, we should have been relieved from the difficulty of speculating what they had been thinking about. We should have seen that they had had their attention drawn to certain specific points, and that they had come to an agreement upon those specific points. In this case we are left more or less in the dark about that, because, as I have said, there is nothing that shows that anything definite was in the minds of these parties beyond

this, that the defendant was to give the whole of his time to the plaintiffs' business.

Now every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. If I agree with a man to be at a certain place at a certain time, I impliedly agree that I will not be anywhere else at the same time, and so on *ad infinitum;* but it does not at all follow that, because a person has agreed to do a particular thing, he is, therefore, to be restrained from doing everything else which is inconsistent with it. The court has never gone that length, and I do not suppose that it ever will. We are dealing here with a contract of a particular class. It is a contract involving the performance of a personal service, and, as a rule, the court does not decree specific performance of such contracts. That is a general rule. There has been engrafted upon that rule an exception, which is explained more or less definitely in Lumley *v.* Wagner — that is to say, where a person has engaged not to serve any other master, or not to perform at any other place, the court can lay hold of that, and restrain him from so doing; and there are observations, in which I concur, made by Lord Selborne in the Wolverhampton and Walsall Railway Company *v.* London and North Western Railway Company,[1] to the effect that the principle does not depend upon whether you have an actual negative clause, if you can say that the parties were contracting in the sense that one should not do this, or the other — some specific thing upon which you can put your finger.

But there is this to be considered. What are we to say in this particular case? What injunction can be granted in this particular case which will not be, in substance and effect, a decree for specific performance of this agreement? It appears to me the difficulty of the plaintiffs is this, that they cannot suggest anything which, when examined, does not amount to this, that the man must either be idle, or specifically perform the agreement into which he has entered. Now there, it appears to me, the case goes beyond Lumley *v.* Wagner, and every case except Montague *v.* Flockton. The principle is that the court does not decree specific performance of contracts for personal service, and the question is, whether there is anything in this case which takes it out of that principle. I cannot see that there is. Reliance was placed on Montague *v.* Flockton, in which also there was no negative clause. I pass by the prior case, before Wood, V. C., Webster *v.* Dillon,[2] because it was not argued, and the defendant did not appear; but in Montague *v.* Flockton, Malins, V. C., did go to the length of restraining an actor from performing at a rival theatre although there was no stipulation on his part, in terms, that he would not do so; and with great deference to the learned judge, I must say I think he arrived at that conclusion owing to a misunderstanding of Lumley *v.* Wagner. I cannot read the decision of Malins, V. C., without seeing that he was under the impression that Lord St. Leonards

[1] Law Rep. 16 Eq. 433.

[2] 3 Jur. (N. S.) 432.

in Lumley *v.* Wagner would have granted the injunction, even if the negative clause had not been in the contract. This was a mistake. Lord St. Leonards was very clear and explicit on that subject. He said distinctly he would not have done it in the absence of that negative clause, but he did go on to say in other parts of his judgment that in the absence of that negative clause there would have been a breach of the agreement. That is true enough, and Malins, V. C., I think, was under the impression that Lord St. Leonards intended to intimate not only that there would be a breach of the agreement, but that the remedy of injunction would be granted in the absence of that negative clause, which is not in accordance with the judgment in Lumley *v.* Wagner, as I understand it. Apart from Montague *v.* Flockton, there is no case which warrants the injunction which the learned judge in this case has made, and we must therefore fall back and see if we can find any principle upon which he has acted. Now, unquestionably, if the principle were that the court would decree specific performance of all contracts, that would carry it; but the principle being the other way as regards contracts of service, it lies upon the plaintiffs to show that there is some recognized exception in this particular case, and that they fail to do.

I agree with what the late Master of the Rolls, Sir G. Jessel, said about there being no very definite line. I agree, also, in what Lord Justice Fry has said more than once, that cases of this kind are not to be extended. I confess I look upon Lumley *v.* Wagner rather as an anomaly to be followed in cases like it, but an anomaly which it would be very dangerous to extend. I make that observation for this reason, that I think the court, looking at the matter broadly, will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appears to me to be immaterial. It is on the ground that mischief will be done to one at all events of the parties that the court declines in cases of this kind to grant an injunction, and leaves the aggrieved party to such remedy as he may have apart from the extraordinary remedy of an injunction. I am assuming that the defendant either has broken his agreement, or intends to do so if he can. I assume that he is wrong, but I say, assuming that, the remedy is not that which the plaintiffs claim, *i. e.*, by injunction, but by damages, when the agreement is broken.

Kay, L. J. . . . What the plaintiffs have tried to do is this, to prevent the defendant from setting up a rival business, by obtaining the assistance of the court for specific performance of that part of the agreement which expresses that he shall give the whole of his time to their business. There are two answers to the case they make, one is this — that the defendant never has contracted in any way that he will not set up a rival business. He has not contracted that he will not become a director of a rival company, nor that he will not

form a rival company, and if he does it out of business hours, it is, as I understand, admitted that no injunction ought to be granted against him.

What strikes me in this case is that if the court could possibly interfere in the way in which the learned judge has interfered, by injunction, I do not see any contract of hiring and service in which it ought not also to interfere. To take the most simple and ordinary case, of a man's domestic servant, his butler (which was one of the cases put by way of illustration in one of the judgments referred to), who has contracted to give the whole of his time to his master's service. Could it possibly be argued that an injunction could be obtained to prevent his serving some one else during that engagement? Yet if a negative is to be implied, I do not see any case whatever in which it could be more clearly implied than in a case of that kind. We must tread with very great caution such a path as that which this application invites us to pursue; and, as I think this case goes very far beyond any case which has been decided with consideration up to this time, I certainly am very strongly disinclined to support this decision; I am all the more disinclined to support it, because one cannot help seeing that the mode in which this injunction is granted is really the only mode in which the court could possibly have granted such an injunction. The court has implied a negative in the contract to give the whole of his time, and has therefore granted an injunction to prevent his giving any of his time to any other purpose. It is not really wanted, *bona fide*, for that purpose, but it is wanted to prevent him from setting up a rival business, which he has not contracted not to do.

I therefore think that this decision must be reversed, and the appeal allowed.[1]

L. D. CARTER, Appellant, *v.* W. J. FERGUSON, Respondent.

Supreme Court, New York, December Term, 1890.

[58 *Hun*, 569.]

Appeal from an order denying the plaintiff's motion for an injunction restraining the defendant from performing services for any per-

[1] In Eberman *v.* Bartholomew, 1898, 1 Ch. 671, the defendant agreed as a traveller for the plaintiffs, wine merchants, to devote the whole of his time for ten years during the usual working hours to the business of the plaintiffs and not to engage in any other business during the continuance of the contract. The defendant left the plaintiffs after a few months and entered the service of another firm of wine merchants. The plaintiffs moved for an injunction restraining the defendant from engaging in any other business than that of the plaintiffs. Romer, J., refused the motion, saying, p. 674: "It is clear that in this clause the word 'business' cannot be held limited by the context to a wine merchant's business or in any similar way. So that the court, while unable to order the defendant to work for the plaintiffs, is asked indirectly to make him do so by otherwise compelling him to abstain wholly from business, at any rate during all usual business hours. In my opinion such a stipulation is unreasonable and ought not to be enforced by the court." — Ed.

sons other than the plaintiff until a certain contract, made by the defendant with the plaintiff, should have been performed.

BARTLETT, J.: In order to warrant the granting of a preliminary injunction to restrain the violation of a contract, it should be made to appear that the plaintiff has no adequate remedy at law. The inadequacy of the legal remedy is the test as to whether the defendant should or should not be restrained in the class of cases to which the present suit belongs. The English courts and our own have frequently granted injunctions *pendente lite*, to prevent actors from performing for other parties when they have undertaken to play only for the plaintiff; but the exercise of this jurisdiction has usually been confined, and ought, in our judgment, always to be limited, to cases where the artistic abilities of the defendant are exceptional, so that his place cannot readily be supplied, for it would seem to be only under such circumstances that irreparable damage can be occasioned to the plaintiff. As is well said by Mr. Pomeroy: "Where a contract stipulates for special, unique, or extraordinary personal services or acts, or for such services or acts to be rendered or done by a party having special, unique, and extraordinary qualifications, as, for example, by an eminent actor, singer, artist, and the like, it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same or the same kind of services or acts elsewhere, or by employing any other person." (3 Pomeroy's Eq. Jur. § 1343.) The General Term of the third department, commenting upon this passage, points out that the jurisdiction to interfere by injunction approved therein is confined to cases of special, unique, and extraordinary qualifications on the part of the defendant, and Learned, P. J., remarks: "It can readily be seen that the court might restrain by injunction a great actor from playing at another theatre in violation of his contract, while it would not restrain a salesman from quitting his employ before his contract had expired, even though, under the contract, he were to be paid a percentage on sales." Bronk *v.* Riley.[1]

Now, it is in no wise derogatory to the defendant in this case to say that he is not shown to be an actor of special, unique, or extraordinary qualifications. His own counsel on this appeal expressly asserts that the defendant is not a star or attraction of the company, or even a prominent member thereof.

However capable an actor the defendant may be, he has not yet achieved distinction. He does not seem to have been engaged to perform what is known as the part of the leading man in the plaintiff's company, his name appearing only third in the published list of the performers who were to act with Mrs. Carter. The affidavits do not satisfy us that his failure to keep his contract with her, or his appearance, in violation of that contract, at another theatre has done or will do her any irreparable injury, or any damage incapable of being ascertained in an action at law.

[1] 50 Hun, 489.

For these reasons, without considering the others urged by counsel, or referred to by the court below, we think the application for an injunction was properly denied.[1]

The order appealed from must be affirmed, with ten dollars costs and disbursements.

VAN BRUNT, P. J., and BARRETT, J., concurred.

THE DIAMOND MATCH CO., RESPONDENT, v. W. ROEBER, APPELLANT.

COURT OF APPEALS, NEW YORK, OCTOBER 4, 1887.

[106 *New York Reports*, 473.]

ANDREWS, J. Two questions are presented: first, whether the covenant of the defendant contained in the bill of sale executed by him to The Swift & Courtney & Beecher Company on the 27th day of August, 1880, "that he shall and will not, at any time or times within ninety-nine years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employe of said The Swift & Courtney & Beecher Company), within any of the several States of the United States of America, or in the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the State of Nevada and in the territory of Montana," is void as being a covenant in restraint of trade; and, second,[2] as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant.

We are of opinion that the equitable jurisdiction of the court to enforce the covenant by injunction, was not excluded by the fact that

[1] Wm. Rogers Co. *v.* Rogers, 58 Conn. 356 (general agent and manager); Burney *v.* Ryle, 91 Ga. 701 (insurance agent); Jaccard Co. *v.* O'Brien, 70 Mo. Ap. 432 (salesman); Bronk *v.* Riley, 50 Hun, 489 (*semble* — salesman); Strobridge Co. *v.* Crane, 35 N. Y. St. Rep. 473, 12 N. Y. Sup. 898 s. c. (lithographer and designer); Hoyt *v.* Fuller, 47 N. Y. St. Rep. 504, 19 N. Y. Sup. 962 s. c. (*semble* — actor); W. J. Johnston Co. *v.* Hunt, 66 Hun, 504, affirmed in 142 N. Y. 621 (advertising solicitor); Roosen *v.* Carlson, 46 N. Y. Ap. Div. 233, 235 (*semble*); DePol *v.* Sohlke, 7 Rob. (N. Y.) 280 (danseuse); Columbus Club *v.* Reiley, 25 Oh. W. L. Bull. 385 (ball-player); Cort *v.* Lassard, 18 Oreg. 221 (acrobat). *Accord.* 132 Pa. 155; 70 A. J. Eq. 541-7; 52 Cent. L. J. 449;

See Harrisburg Club *v.* Athletic Ass'n, 8 Pa. Co. Ct. R. 337, 342.

In W. J. Johnston Co. *v.* Hunt, *supra*, O'Brien, J., cites with approval the following remarks by Barrett, J., in Strobridge Co. *v.* Crane, 35 N. Y. St. Rep. 473: "It may sometimes be difficult to say just what is a special, unique, or extraordinary service, or whether the employee possesses special, unique, or extraordinary qualifications. The solution may generally be reached by an inquiry as to whether a substitute for the employee can readily be obtained, and whether such substitute will substantially answer the purpose of the contract; in other words, whether the individual service specially contracted for is essential to prevent irreparable injury. The foundation of the jurisdiction is the inability of the law to afford adequate redress." — ED.

[2] Only so much of the opinion as relates to the second question is given. The first question was decided in favor of the plaintiff. — ED.

the defendant, in connection with the covenant, executed a bond for its performance, with a stipulation for liquidated damages. It is, of course, competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee in lieu of performance. Phœnix Ins. Co. *v.* Continental Ins. Co.[1] But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated, does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be enforced. It was said in Long *v.* Bowring,[2] which was an action in equity for the specific performance of a covenant, there being also a clause for liquidated damages, "all that is settled by this clause is that if they bring an action for damages the amount to be recovered is £1,000, neither more nor less." There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed, and not that the defendant might at his option repurchase his right to manufacture and sell matches on payment of the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases.[3] Phœnix Ins. Co. *v.* Continental Ins. Co.; Long *v.* Bowring;

[1] 87 N. Y. 400, 405.

[2] 33 Beav. 585.

[3] That equity, by an injunction, will decree specific performance of a contract not to carry on a trade or profession in competition with the plaintiff is universally conceded. Harrison *v.* Gardner, 2 Mad. 198; Williams *v.* Williams, 2 Sw. 253; Whittaker *v.* Howe, 3 Beav. 209; Rolfe *v.* Rolfe, 15 Sim. 88; Duignan *v.* Walker, 5 Jur. N. S. 976; Daggett *v.* Reiman, 17 L. T. Rep. 486; Clarkson *v.* Edge, 3 N. R. 283; Ainsworth *v.* Bentley, 14 W. R. 630; Benwell *v.* Inns, 24 Beav. 307; Newling *v.* Dobell, 19 L. T. Rep. 408; Dales *v.* Weaber, 18 W. R. 993; Nordenfelt *v.* Maxim Co., 1894, Ap. Cas. 535; Robinson *v.* Heller, 1898, 2 Ch. 451; Bowling *v.* Taylor, 40 Fed. R. 404; Carter *v.* Alling, 43 Fed. R. 208; Brown *v.* Kling, 101 Cal. 295; Cook *v.* Johnson, 47 Conn. 175; Spier *v.* Lambdin, 45 Ga. 319; Swanson *v.* Kirby, 98 Ga. 586; Bullock *v.* Johnson, 110 Ga. 486; Beard *v.* Dennis, 6 Ind. 200; Baker *v.* Pottmeyer, 75 Ind. 451; Beatty *v.* Coble, 142 Ind. 329; O'Neal *v.* Hines, 145 Ind. 32 (but see Thayer *v.* Young, 86 Ind. 259); Hedge *v.* Lowe, 47 Iowa, 137; Cole *v.* Edwards, 93 Iowa, 470; Pohiman *v.* Dawson, (Kansas, 1901) 65 Pac. R. 689; Guerand *v.* Dandelet, 32 Md. 561; Angier *v.* Webber, 14 All. 211; Morse *v.* Morse, 103 Mass. 73; Dwight *v.* Hamilton, 113 Mass. 175; Anchor Co. *v.* Hawkes, 171 Mass. 101; Beal *v.* Chase, 31 Mich. 490; Grow *v.* Seligman, 47 Mich. 607; Timmerman *v.* Dever, 52 Mich. 34; Bailey *v.* Collins, 59 N. H. 459; Richardson *v.* Peacock, 26 N. J. Eq. 40, 28 N. J. Eq. 151; Francisco *v.* Smith, 143 N. Y. 488; Davies *v.* Racer, 72 Hun, 43; Baumgarten *v.* Broadaway, 77 N. Ca. 8; Baker *v.* Cordon, 86 N. Ca. 116; Cowan *v.* Fairbrother, 118 N. Ca. 406; Morgan *v.* Perhamus, 36 Oh. St. 517; Palmer *v.* Graham, 1 Pars. Eq. 476; McClurg's Ap., 58 Pa. 51; Harkinson's Ap., 78 Pa. 196 (*semble*); Paxson's Ap., 106 Pa. 429; Smith's Ap., 113 Pa. 579; Carroll *v.* Hickes, 10 Phila. 308; Eckart *v.* Gerlach, 12 Phila. 530; Butler *v.* Burleson, 16 Vt. 176, and cases cited in the two paragraphs following.

PROVISION OF PENALTY FOR BREACH NO BAR TO INJUNCTION. — The injunction will issue none the less surely although the agreement not to carry on the trade or profession is in the form of a bond with a penalty. Barret *v.* Blagrave, 5 Ves. 555, 6 Ves. 104; Sainter *v.* Ferguson, 1 Mac. & G. 286, 13 Jur. 833 s. c.; Fox *v.* Scard, 33 Beav. 327; French *v.* Macale, 2 Dr. & War. 269; McCaull *v.* Braham, 16 Fed. R. 37; Smith *v.* Brown, 164 Mass. 584

Howard *v.* Woodward;[1] Coles *v.* Sims;[2] Avery *v.* Langford;[3] Whittaker *v.* Howe;[4] Hubbard *v.* Miller.[5]

There is no error disclosed by the record and the judgment should, therefore, be affirmed.

All concur, except Peckham, J., dissenting.

Judgment affirmed.

(*semble*); Crane *v.* Peer, 43 N. J. Eq. 553; Wilkinson *v.* Colley, 164 Pa. 35; Reece *v.* Hendricks, 1 Leg. Gaz. R. 79; Gillis *v.* Hall, 7 Phila. 422.

Provision of Liquidated Damages for Breach no Bar to Injunction. — Nor is the right to an injunction lost, even though the amount payable for a breach of the agreement is fixed in advance as liquidated damages. Avery *v.* Langford, Kay, 663; Carnes *v.* Nesbitt, 30 L. J. Ex. 348 (*semble*); Howard *v.* Woodward, 10 Jur. N. S. 1123, 34 L. J. Ch. 47 S. C.; Jones *v.* Heavens, 4 Ch. D. 636; McCurry *v.* Gibson, 108 Ala. 451; Ropes *v.* Upton, 125 Mass. 258; Zimmermann *v.* Gerzog, 13 N. Y. Ap. Div. 210; Reynolds Co. *v.* Dreyer, 12 N. Y. Misc. Rep. 368; Stewart *v.* Bedell, 79 Pa. 336. Equitable relief is given on the same principle in the case of other negative agreements secured by liquidated damages for their breach; *e. g.*, restrictive covenants. Coles *v.* Sims, 5 D. M. & G. 1 (*semble*); Watrous *v.* Allen, 57 Mich. 362, 368 (*semble*); Phœnix Co. *v.* Continental Co., 87 N. Y. 400.

But in a few jurisdictions the courts regard the provision for liquidated damages as an adequate remedy at law, and accordingly decline to give the equitable remedy of an injunction. Martin *v.* Murphy, 129 Ind. 464; O'Neal *v.* Hines, 145 Ind. 32, 35 (*semble*); Stafford *v.* Shortreed, 62 Iowa, 524 (but see Beeman *v.* Hexter, 98 Iowa, 378); Hahn *v.* Concordia Society, 42 Md. 460. The New York cases to the same effect, Vincent *v.* King, 13 How. Pr. 234; Barnes *v.* McAllister, 18 How. Pr. 534, and Nessle *v.* Reese, 29 How. Pr. 382, are overruled by the principal case.

Contract in the alternative. — If, fairly interpreted, the contract gives the promisor the option of carrying on the trade (or doing some other act) by paying a fixed amount of money, the carrying on of the trade is not a breach of the contract, and there is obviously no ground for equitable relief. For this reason an injunction was denied in Woodward *v.* Gyles, 2 Vern. 119; Rolfe *v.* Peterson, 2 Bro. P. C. (Toml. Ed.) 436; Forbes *v.* Carney, Wallis, 38; Dills *v.* Doebler, 62 Conn. 366; Smith *v.* Bergengren, 153 Mass. 236. See also Magrave *v.* Archbold, 1 Dow, 107; Hurst *v.* Hurst, 4 Ex. 571; Legh *v.* Lillie, 6 H. & N. 165.

Provision for Penalty or Liquidated Damages no Bar to Specific Performance of Affirmative Contracts. — *Penalty.* — Holtham *v.* Ryland, Nels. 205; Hobson *v.* Trevor, 2 P. Wms. 191; Cannel *v.* Buckle, 2 P. Wms. 243; Moorecroft *v.* Dowling, 2 P. Wms. 314; Anon, Mos. 37; Howard *v.* Hopkins, 2 Atk. 371; Chilliner *v.* Chilliner, 2 Ves. Sr. 529; Roper *v.* Bartholomew, 12 Price, 797; Logan *v.* Wienholt, 1 Cl. & F. 611; Whitney *v.* Stone, 23 Cal. 275; Amenda Co. *v.* People's Co., (Colo. 1901) 64 Pac. R. 218; Broadwell *v.* Broadwell, 6 Ill. 599; Chamberlain *v.* Blue, 6 Blackf. 491; Ensign *v.* Kellogg, 4 Pick. 1; Dooley *v.* Watson, 1 Gray, 414; Daily *v.* Litchfield, 10 Mich. 29; Ewing *v.* Gordon, 49 N. H. 445; Parker *v.* Estabrook, 68 N. H. 349; Gordon *v.* Brown, 4 Ired. Eq. 399; Dike *v.* Greene, 4 R. I. 285; Telfair *v.* Telfair, 2 Dess. 271.

Liquidated damages. — Long *v.* Bowring, 33 Beav. 585; Morris *v.* Lagerfelt, 103 Ala. 608; Glock *v.* Howard Co., 123 Cal. 1, 9 (*semble*); Hull *v.* Sturdivant, 46 Me. 34; Cartwright *v.* Gardner, 5 Cush. 273; Hooker *v.* Pynchon, 8 Gray, 550; O'Connor *v.* Tyrrell, 53 N. J. Eq. 427 (qualifying St. Mary's Church *v.* Stockton, 8 N. J. Eq. 532). — Ed.

[1] 10 Jur. N. S. 1123. [2] 5 De G., Macn. & G. 1. [3] Kay's Ch. 663.
[4] 3 Beav. 383. [5] 27 Mich. 15.

LAZAR STERNBERG *v.* JAMES O'BRIEN.

In Chancery, New Jersey, May Term, 1891.

[48 *New Jersey Equity*, 370.]

Van Fleet, V. C. The main question presented for decision in this case is, whether or not the complainant is entitled to a decree restraining the defendant from violating his contract. The case is before the court on final hearing. The parties to the suit, on the 20th day of January, 1891, made a contract under seal, by which the complainant employed the defendant in the capacity of collector in the instalment clothing business, carried on by the complainant in Newark and Jersey City, at a weekly salary of $20, and agreed, in addition, to keep the defendant in his employ, as collector, so long as the defendant performed his work honestly and faithfully and to the satisfaction of the complainant; and the defendant agreed, in consideration of such employment, that during its continuance, and for one year after he ceased to be employed by the complainant, whether he voluntarily abandoned such employment or was discharged therefrom, he would not engage in, or be concerned or interested in the instalment clothing business, in the city of Newark or Jersey City, on his own account, or as the agent or employee of any other person, in any capacity. The defendant served the complainant under the contract from its date until the 23d day of February, 1891, a period of between four and five weeks, and then abandoned his service, and shortly afterward accepted employment, as collector, from a person carrying on a rival business in Newark. It is undisputed that the defendant has, without cause, violated one of the most important provisions of his contract. Against the injury which is thus inflicted the complainant asks to be protected by injunction. He wants the defendant prohibited from being employed, in any capacity in the instalment clothing business, by any person carrying on that business either in Newark or Jersey City, for the space of one year from the time the defendant left his employ.

The next[1] ground on which relief is resisted is, that the injury which the complainant has sustained, by the defendant's violation of his contract, is not irreparable, but can be fully and effectually redressed by the damages which may be recovered in an action at law. The ordinary and usual judicial remedy for a breach of contract is an action at law, and in cases where that remedy will fully answer the purposes of justice the law courts have exclusive jurisdiction, and courts of equity are entirely without jurisdiction. A court of equity, in exercising its prohibitory power, must always proceed with the utmost caution and see to it that its power is not so exercised as to do

[1] The court decided that the agreement restricted the defendant only as to engaging in the instalment clothing business and therefore was not illegal. The opinion of the court on this point and a small portion of the rest of the opinion are omitted. — Ed.

more harm than good. The power exists to prevent irreparable wrong, and should not, therefore, be used, in any case, when its use will produce the very result it was designed to prevent.

Testing the complainant's right to an injunction by the principles above stated, I think it is clear that this court cannot grant him what he asks without transcending its jurisdiction. He wants the court to restrain the defendant from working at a particular employment in two of the largest cities of the state. To many persons the right to labor is the most important and valuable right they possess; it is their fortune, constituting the only means they have to obtain food, raiment, and shelter, and to acquire property. To such persons a deprivation of this right is ruin, and to abridge it is to do them an injury which will very likely result in their ruin. When, therefore, a court is asked either to deprive a person of this right, or to abridge it, it is its duty, before it acts, to consider with the utmost care whether, if it does what it is asked to do, it will not, on a careful comparison of consequences, do more injustice than justice. The defendant, it is true, has broken his contract, but that fact, standing alone, presents no ground whatever for the interference of this court; indeed, scarcely more than would be presented by a case where the ground of action was a breach of warranty made on the sale of a horse. For a breach of contract the ordinary and exclusive remedy is an action at law, unless it is made clearly to appear that the damages resulting from it cannot be adequately compensated in money. In my judgment nothing of that kind appears in this case. It is neither averred nor proved that the defendant, while in the complainant's employ under the contract in question, occupied a position of special confidence towards the complainant, and thus acquired a knowledge of his business secrets and methods which he may now use so as to benefit a rival and seriously injure the complainant. The defendant's contract required him to serve the complainant in carrying on the instalment clothing business. That business, the proofs show, is conducted in this way: garments are delivered to purchasers under contracts that the price agreed upon shall be paid in instalments at short intervals — weekly or other short periods — and that the title to the garments shall remain in the vendor until all the instalments have been paid. The defendant was employed as a collector. That is the employment specified in his contract. He was to go to the persons to whom garments had been sold and collect the instalments as they became due. He was not employed as a salesman; he made no sales; nor was he required to render the complainant any service except to make collections from his customers. So that the only way he was brought in contact with the complainant's customers was in going to them to collect money from them. There is not a word of evidence going to show that the defendant possesses the slightest influence over a single one of the complainant's customers.

But there is another fact which, in my judgment, is decisive against the complainant's claim that the damages he will sustain by defend-

ant's breach of his contract cannot be adequately compensated in money. The defendant's period of service under the contract was less than five weeks. He served the complainant under the contract just twenty-seven secular days. This time was entirely too short, and his intercourse with the complainant's customers much too slight and infrequent to enable him, even if it be conceded that he possessed unusual magnetic power, to acquire much influence over them; certainly not enough to put it in his power to do the complainant any very serious injury.

The complainant's bill must be dismissed, with costs.

46 S. 90; 114 A. W. 402; 5 N. Y. A. D. 232 - accord.

R. G. SALOMON *v.* M. HERTZ AND OTHERS.

In Chancery, before Theodore Runyon, C., October Term, 1885.

[40 *New Jersey Equity Reports*, 400.]

The Chancellor.[1] The complainant seeks by this suit to prevent Hertz and Adolphi, who were his trusted and confidential employees, from divulging to any one, and especially to Shattuck and Binger, any of the secrets of his business (that of a tanner and manufacturer of leather), and to prevent Shattuck and Binger from accepting or using the information if communicated. He claims to be the discoverer of valuable secret and peculiar methods and processes for making Cordovan leather, and for tanning and manufacturing into leather of various desirable shades and colors, goat, kangaroo, alligator, and snake skins and porpoise hides, which leathers are all very marketable and in great demand, and consequently bring high prices, and the making thereof is a source of great profit to him. He has carried on the business in Newark for about eight years. He alleges that Hertz was in his employment for five years, and was his bookkeeper, and in his absence acted as general manager of the establishment in his stead; and that Adolphi was the superintendent, and entered his employment about 1877, and that both agreed with him on entering his employment, and frequently afterwards, that in consideration of his employing them they would keep the secrets of his business and divulge them to no one. The bill states that they recently left him and have made arrangements with Shattuck and Binger to enter into business with them in Newark, in the tanning and manufacture, in competition with him, of the before-mentioned kinds of hides and skins into leather by his secret and peculiar methods and processes. They have, in fact, made arrangements with Shattuck and Binger to enter into the business of tanning and manufacturing leather with them in Newark.

That the facts stated in the bill entitle the complainant to the aid

[1] Only a portion of the opinion of the court is given. — Ed.

of equity will admit of no question. One who invents or discovers and keeps secret a process of manufacture, whether patentable or not, has a property therein which this court will protect against one who, in violation of contract and breach of confidence, undertakes to apply it to his own use or to disclose it to a third person.[1] Peabody *v.* Norfolk;[2] Kerr on Inj. 181.

But it is urged that all of the facts upon which the claim to relief is based have been fully and explicitly denied, and it is insisted that, therefore, the injunction should be dissolved. But it may be that the complainant is able to establish the truth of the statements of his bill notwithstanding the positive denials of the answers. To dissolve the injunction now would, if he indeed has the secret peculiar methods and processes which he claims to have, and which he swears that he discovered and employs, leave him wholly without remedy, and inflict upon him irreparable injury; for if the injunction be dissolved, Hertz and Adolphi may make those methods and processes known to whomsoever they see fit, and so complainant's success at the conclusion of the suit, were he to pursue it to the end, would be but a barren and worthless victory. The sole object of the suit is protection by means of injunction. To dissolve the injunction now would practically decide the cause in favor of the defendants, without giving the complainant an opportunity to establish the truth of the case made by his bill. It is the duty of the court in such a case as this, in the exercise of a sound judicial discretion and discrimination, to retain the injunction until the final hearing. In this case there can be no reasonable objection to that course on the part of the defendants themselves, for they say and insist that the complainant has no secret peculiar methods and processes; and that, if he has any, they do not propose to use them. There is, therefore, no reason why the injunction should not, as to those matters, stand, for his protection, until the truth and right of the case shall be demonstrated.

The motion to dissolve is denied, but without costs.

[1] Morrison *v.* Moat, 9 Hare, 24[1], 21 L. J. Ch. 248 (*semble*); Leather Co. *v.* Lorsont, 9 Eq. 345 (Lord Eldon's opinion to the contrary in Newberry *v.* James, 2 Mer. 446, and Williams *v.* Williams, 3 Mer. 157, has met with no support); Peabody *v.* Norfolk, 98 Mass. 452; O. & W. Thum Co. *v.* Tloczywski, 114 Mich. 149; Gold Co. *v.* Todd, 17 Hun, 549 (private information as to stock quotations); Champlin *v.* Champlin, 36 Hun, 300; Eastman Co. *v.* Reichenbach, 79 Hun, 183; Hammer *v.* Barnes, 26 How. Pr. 174; Fralich *v.* Despar, 165 Pa. 24; Lowenstein *v.* Faldner, 2 N. Y. Misc. Rep. 176 *Accord.* — Ed.

[2] 98 Mass. 452.

LORD MANNERS *v.* JOHNSON.

In the Chancery Division, December 15, 1875.

[*Law Reports*, 1 *Chancery Division*, 673.]

An estate had been laid out for building purposes according to a regular scheme; and upon a part of it, known as Palace Road, five houses Nos. 3 to 8 had been built in a line with and at a distance of about forty feet from one another, the fronts being about eight feet from Palace Road. The defendant purchased from the assignors of the plaintiff lots Nos. 1 and 2 of this estate and covenanted not to erect thereon any building nearer to Palace Road than the houses Nos. 3 to 8. The defendant built upon his lots two houses with bay windows projecting about three feet beyond the line of frontage of the other houses. The bill prayed for an injunction to restrain the defendant from proceeding further with the erection of the houses in violation of his covenant, and from permitting the projecting bay windows to remain.[1]

Hall, V. C. There is, in my opinion, a violation of the covenant. But then it is said it is not a case for a mandatory injunction, because, although the covenant may be such as I have held it to be, not only is the amount of damage and injury *nil*, but more than that, what has been done is actually an improvement to the plaintiff's property. Of course the plaintiff is the best judge of what will be an improvement to his own property; but I take it now to be the law that if a covenant of this character is entered into with reference to the position of buildings upon a particular plot of ground as part of a scheme for building upon property, then the party who stipulates for and obtains that covenant does so free from being embarrassed by the question whether any, and if any, what injury or damage is consequent on the breach of the covenant, and that an assign of the benefit of the covenant is in as good a position as the original covenantee. One of the earliest cases in which this doctrine is distinctly stated was the case of Kemp *v.* Sober.[2] In that case Lord Cranworth[3] expresses himself thus: "It was said that this case comes within the principle of those cases in which the court has refused to interfere because no damage has been actually sustained; but a person who stipulates that her neighbor shall not keep a school, stipulates that she shall be relieved from all anxiety arising from a school being kept, and the feeling of anxiety is damage."

Then there is the case of Tipping *v.* Eckersley,[4] where Vice-Chancellor Wood laid down the rule thus: "If the construction of the instrument be clear, and the breach clear, then it is not a question of

[1] The statement of the case is much condensed, and the arguments and a portion of the judgment are omitted. — Ed.

[2] 1 Sim. (N. S.) 517. [3] 1 Sim. (N. S.) 520. [4] 2 K. & J. 264, 270.

damage, but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction. And I apprehend the court may so interfere whether the defendant has or has not actually committed the breach in respect of which the interference of the court is sought. For in a case of contract it is enough if the defendant claims and insists on a right to do the act, although he has not already done it, *modo et forma*, as alleged. In such a case I should have no difficulty in granting an injunction."

Then Lord Romilly, having made observations on that head in Western *v.* Macdermott,[1] Lord Chelmsford, when the case went before him on appeal, showed he did not acquiesce in the view taken by Lord Romilly. Then we have the whole subject reviewed and considered by the present master of the rolls in the case of Leech *v.* Schweder,[2] where he went through all the authorities, referring to a very clear expression of the same view by the late Master of the Rolls, Lord Romilly, in the case of Dickinson *v.* Grand Junction Canal Company.[3] I think, therefore, that the law is as I have laid it down.

I see no reason why the court should not exercise its jurisdiction by a mandatory injunction as to the bow windows. I cannot listen to suggestions of hardships and loss of value, and so forth. The defendant, by cutting off the bow windows, will have to make every one of his rooms that has a bow window smaller. But he must take the consequences of that.[4]

HUNT *v.* HUNT.

IN CHANCERY, BEFORE LORD WESTBURY, C., JANUARY 11, 1862.

[4 *De Gex, Fisher and Jones*, 221.]

THIS was an appeal from the refusal of the master of the rolls to grant an injunction to restrain proceedings on the part of the defendant for the restitution of conjugal rights, which proceedings were in violation of a covenant entered into by the defendant in a separation deed.[5]

[1] Law Rep. 1 Eq. 499. [2] Law Rep. 9 Ch. 465, n. [3] 15 Beav. 260.

[4] Macher *v.* Foundling Hospital, 1 V. & B. 188; Tipping *v.* Eckersley, 2 K. & J. 264, 273; Dickinson *v.* Grand Junction Co., 15 Beav. 260; Ingram *v.* Morecraft, 33 Beav. 49, 51; Western *v.* MacDermott, 2 Ch. 72, 75 (per Lord Chelmsford qualifying remarks of Lord Romilly in s. c. 1 Eq. 499); Leech *v.* Schweder, 9 Ch. 465, n. (1); World's Exposition *v.* U. S., 56 Fed. Rep. 654, 667 (*semble*); Consol. Co. *v.* Schmisseur, 135 Ill. 371, 378; Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206, 216; Hills *v.* Miller, 3 Paige, 254; Steward *v.* Winters, 4 Sandf. Ch. 587 *Accord*

In Dickinson *v.* Grand Junction Co., *supra*, Lord Romilly said, pp. 271, 272: "If it be a contract duly entered into between the parties . . . it is no answer to them to say that the diversion proposed will not be injurious to them, or even to prove that it may be beneficial to them. It is for them to judge whether the agreement shall be preserved, so far as they are concerned, in its integrity, or whether they shall permit it to be violated." — ED.

[5] The detailed statement of the case and the arguments are omitted; only so much of the judgment is given as relates to the question of jurisdiction. — ED.

The Lord Chancellor. Is this covenant such a contract as consistently with the rules and principles of a court of equity ought to be preserved and kept from violation and breach by the injunction of the court? That is, in point of fact, — in a different form of expression not very accurate, but sufficiently accurate for the purpose, — Is this a contract which by a court of equity ought to be specifically performed? Now specific performance is granted where that remedy is required by the nature of the contract; that is, when the remedy given by a court of law is imperfect and inadequate to fulfil and reach the real intent and object of the parties. I have no doubt therefore at present that, both with reference to the reason of the thing, namely, the necessity of this court's intervention to prevent the contract from being annulled, and with reference also to the mode in which the jurisdiction of this court has been exercised, — as, for example, the mode in which the court has dealt with engagements not to carry on trade in particular districts where such engagements have been protected by covenants and a penalty, or by a covenant terminating in liquidated damages, and the manner in which the court has interfered to compel the specific performance of similar engagements entered into in the articles of clerks or apprentices, — I have no doubt, I say, of the power of the court, or of the duty of the court, having regard to these instances of the exercise of its jurisdiction, to interfere by its injunction and restrain the breach of this covenant. No other conclusion can possibly be arrived at without involving ourselves in the moral absurdity of in terms pretending to declare a contract binding and refusing to extend to it the only remedy and the only mode of execution that can secure to the contracting parties the real benefit of the covenant, that is, by injunction.

Unless, therefore, I mention this matter on the first day of next term, the injunction will be granted.

The importance of this case, and the great respect due to the judgment of the master of the rolls, have induced me to reconsider it during the recess; but I find no reason for changing the opinion which I partly expressed at the conclusion of the argument. The injunction now asked for seems to be the necessary consequence of principles which have been established by the highest authority. It is well settled in courts of law, that deeds of separation are good and valid. Mutual covenants by the husband and trustees of the wife that neither shall sue the other for the restitution of conjugal rights are properly and usually inserted in such deeds of separation. If such covenants were against the policy of the law, the deed of separation itself would be invalid and void; but, on the contrary, it is settled that an action may be maintained on such covenants. In equity, the validity of deeds of separation is also established; and, further, it has been decided by the House of Lords that an agreement to execute a deed of separation will be specifically performed,[1] and

[1] Wilson *v.* Wilson, 1 H. L. C. 538, 5 H. L. C. 840; Gibbs *v.* Harding, 5 Ch. 336 *Accord.* — Ed.

that a covenant not to sue for restitution of conjugal rights is a proper constituent part of such a deed.

The argument before me on the part of the defendant admits the legal validity of the deed, and that an action at law might be maintained for breach of the covenant not to sue for restitution; but it is contended that an injunction ought not to be granted to restrain the breach of the covenant. It is proved that the court of divorce, according to the interpretation which rightly or wrongly it has put on the statute creating it, will not recognize a deed of separation, or permit it to be pleaded in bar of a suit for restitution. Such was the rule of the ecclesiastical court as is clearly shown by Sir W. Scott in the case of Mortimer *v.* Mortimer.[1] But an action at law for damages for breach of the covenant not to sue for restitution is a most feeble and inadequate remedy, and unless therefore the agreement involved in the covenant can be enforced in this court by means of an injunction restraining its breach, it follows that a deed of separation, whatever may have been the consideration given for it, may be set aside and annulled at the pleasure of either party. A large sum of money may have been given by the relatives of the wife to purchase the release from a dissolute husband, but when the money has been spent, and when the means of proving his misconduct are no longer available, the husband may defeat the whole by a suit for restitution; that is to say, a legal and valid contract for which a valuable consideration was given, is defeated and avoided for want of a sufficient remedy at law. But that is one of the cases in which the law of this country has provided that the larger and more effective jurisdiction of this court may be invoked.

If the covenant of the husband not to sue for restitution, which is a release of the right to compel cohabitation, be founded upon a valuable consideration, an action may be maintained upon it as upon any other legal covenant. A court of equity, in regarding these covenants, cannot take a higher or different ground. It is in this respect bound to follow the law; and the remark that a court of equity in enforcing the covenant would be taking on itself the jurisdiction of the court of divorce, is no more applicable to this court when granting its injunction than it would be to a court of law when supporting an action on the covenant.

The same ground was taken by the judges of common law in the early period of the jurisdiction of this court, when they protested against the right of a court of equity to grant injunctions to stay proceedings at law. An injunction is directed against the individual, and is not a prohibition addressed to the court: it admits the jurisdiction of the court.

For these reasons, with great respect to his Honor, I cannot concur in his conclusion. I reverse his order, and grant the injunction which is prayed.[2]

1 2 Hagg. Consist R. 310.

2 Marshall *v.* Marshall, 27 W. R. 399 (injunction against suit by the wife); Besant *v.* Wood, 12 Ch. D. 605 (injunction against suit by wife) *Accord.*

FRANKLYN *v.* TUTON.

In Chancery, before Sir John Leach, V. C., January 25, 1821.

[5 *Maddock*, 469.]

The defendant was lessee from the plaintiff of certain building ground, and covenanted that the house to be built by her should correspond with the adjoining houses already built, in its elevation. The bill was to compel the defendant, who had not conformed to the covenant, to alter the elevation accordingly.

The Vice-Chancellor decreed according to the prayer of the bill.[1]

But see Cahill *v.* Cahill, 8 App. Cas. 420, 421, *per* Lord Selborne.

Miscellaneous Negative Contracts enforced by Injunction —

By husband not to molest his wife: Sanders *v.* Rodney, 16 Beav. 207.

By wife not to claim dower: Dyke *v.* Rendall, 2 D. M. & G. 209; Tarbell *v.* Tarbell, 10 All. 278; Sullings *v.* Sullings, 9 All. 234; Hitner's App., 54 Pa. 110.

Not to sue the plaintiff as the alleged father of the defendant's children, — because it would save the scandal incident to the common law action. Bomeisler *v.* Forster, 154 N. Y. 229.

Not to sue for a certain time. Compleat Attorney (1st ed.) 325; Blake *v.* White, 1 Y. & C. Ex. 420, 424, 426; Greely *v.* Dow, 2 Met. 176, 178; Billington *v.* Wagoner, 33 N. Y. 31. Such an agreement is no bar to the action at law, but merely the basis of a cross-action for damages. Deux *v.* Jeffries, Cro. El. 352; Thimbleby *v.* Barron, 3 M. & W. 210; Ray *v.* Jones, 19 C. B. N. S. 416; Perkins *v.* Gilman, 8 Pick. 229; Winans *v.* Huston, 6 Wend. 471.

By a father in a separation deed that his children may pass their vacation at such place as the trustees of the deed may designate. Hamilton *v.* Hector, 6 Ch. 701.

Not to write for any weekly paper except the plaintiff's. Stiff *v.* Cassell, 2 Jur. N. S. 348.

By a publishing company not to advertise the skirt-protector of a rival concern. Goddard *v.* American Queen, 44 N. Y. Ap. Div. 454.

Not to manufacture or sell machines infringing certain patents claimed by plaintiffs. American Co. *v.* Crossman, 57 Fed. R. 1021.

No relief by injunction. — In World's Exposition *v.* U. S., 56 Fed. R. 654, reversing s. c. 56 Fed. R. 630, the court declined to enforce by injunction an agreement not to open the World's Fair on Sundays on the ground that the plaintiff's damages could not exceed the amount of the contribution made by the United States, and that this amount was recoverable at law. — Ed.

[1] Atty.-Gen. *v.* Algonquin Club, 153 Mass. 447; Reardon *v.* Murphy, 163 Mass. 501 *Accord.*

Covenants restricting the covenantor as to the use of his land were enforced by the covenantee by injunction, in the following cases: —

Martin *v.* Nutkin, 2 P. Wms. 266 (not to ring a five o'clock bell); DeWilton *v.* Saxon, 6 Ves. 106 (not to break up mowing land); Rankin *v.* Huskisson, 4 Sim. 13 (not to build); Plagrave *v.* Blagrave, 1 De G. & Sm. 252 (not to mow the park); Kemp *v.* Sober, 1 Sim. N. S. 517 (not to carry on certain trades); Nicholson *v.* Rose, 4 De G. & J. 10 (not to cut down trees); Frogley *v.* Lovelace, Johns. 333 (not to kill game); Lloyd *v.* London Co., 2 De G. & Sm. 568 (not to build — although injunction would cause great expense to defendant and some inconvenience to the public); Holmes *v.* Eastern Co., 3 K. & J. 675 (not to give to any but the plaintiff a certain business privilege); Raphael *v.* Thames Co., 2 Ch. Ap. 147 (similar to preceding case); Altman *v.* Royal Co., 3 Ch. D. 228 (not to give to any one but plaintiff a certain business privilege); Bramwell *v.* Lacy, 10 Ch. D. 691 (not to carry on trade); Evans *v.* Davis, 10 Ch. D. 747 (not to affix any outward mark of business); Hudson *v.* Cripps, 1896, 1 Ch. 265 (to keep the whole of a building in residential flats); Exchange Co. *v.* Central News, 1897, 2 Ch. 48 (not to communicate special news to third persons; Pope *v.* Bell, 35 N. J. 1 (not to build beyond a fixed line); Western Co. *v.* Rogers, 42 N. J. Eq. 311 (similar to Altman *v.* Royal Co., *supra*. — Ed.

SECTION II.

Relief for and against Third Persons.

CROSBIE *v.* TOOKE.

In Chancery, before Lord Brougham, C., February 28, 1833.

[1 *Mylne & Keen*, 431.]

In the month of September, 1831, the defendant Tooke and a person of the name of Bickmore entered into an agreement (which, on the 26th of the same month, was reduced to writing and signed by the parties), whereby Tooke agreed to grant, and Bickmore to accept, a lease of a farm and premises at Little Burstead for a term of fourteen years, at a yearly rent of 140*l.* Under this contract Bickmore took possession of the farm; and, in the month of April, 1832, he, for valuable consideration, executed an assignment of all his interest in the farm and premises, and in the benefit of his contract for a lease thereof, to William Crosbie, who was thereupon let into possession; and Tooke having soon afterwards brought an ejectment against Crosbie, the present bill was filed by the latter for a specific performance of the agreement for the lease, and for an injunction against legal proceedings in the mean time. From the answer of Tooke it appeared that Bickmore, at, or shortly after the date of the assignment to Crosbie, had become insolvent; and the Vice-Chancellor, being of opinion that Tooke was released from his contract in consequence of the insolvency of Bickmore before any lease had been executed, his Honor dissolved the injunction.

A motion by way of appeal was now made on behalf of the plaintiff, that the Vice-Chancellor's order might be discharged and the injunction revived.

Mr. *Pepys* and Mr. *Bethell*, for the motion. If the lease had been executed, it must have been drawn in the common form, and would not have contained a covenant against alienation, for no such stipulation was to be found in the agreement. As the lease to be granted, therefore, would have been assignable, the contract itself must be equally so.

Sir *Edward Sugden* and Mr. *Jemmett*, *contra*. Bickmore, it was admitted, was not in a situation to call for a specific performance, inasmuch as his insolvency had disabled him from executing his part of the agreement, and the plaintiff, who claimed by assignment from him, could have no better equity than his assignor. There was no mutuality between these parties. If the plaintiff, notwithstanding

Bickmore's assignment, had chosen to repudiate the contract, the defendant could never have compelled him to complete it.[1]

The Lord Chancellor. I have looked minutely into the circumstances of this case with a view to ascertain whether there was anything, either in the dealing of the parties or in the instrument itself, to justify the defendant's contention that this was a contract made by the landlord specially and personally with Bickmore. But I have been unable to discover anything which should differ the interest here contracted to be given from that which any tenant would have under a common farming lease. The case is, therefore, left to rest upon the ground upon which it was decided in the court below; and I am clearly of opinion, that the circumstance of the party who originally contracted having assigned his interest cannot be taken into consideration, provided (which is the fact here) the assignee be admitted to be a person in solvent circumstances, and able to enter into the covenants in the proposed lease, and that the insolvency of the assignor cannot be set up with effect for the purpose of releasing the defendant from the specific performance of his agreement. That doctrine, which seems to have been approved by Lord Loughborough in Brooke *v.* Hewitt,[2] has been since fully recognized and adopted in Powell *v.* Lloyd;[3] and the case of Weatherall *v.* Geering[4] is no authority against the general principle, for the agreement there was for a lease which should contain a covenant not to assign. It may further be observed, that, even in cases where alienation without license from the landlord is expressly prohibited and guarded by a clause of forfeiture, such a clause has been held to furnish no protection against an assignment of the lease by operation of law, under a commission of bankrupt, for example, or upon an execution for debt: Doe dem. Mitchinson *v.* Carter;[5] Lord Stanhope *v.* Skeggs.[6]

I am therefore of opinion, that the Vice-Chancellor's order must be discharged, and the injunction revived; but, having regard to the intention of the parties, I shall annex, as a condition to my order, that the plaintiff obtain the injunction on paying the defendant the sum due for rent from Michaelmas, 1831, to Michaelmas, 1832.[7]

1 The arguments of counsel are abridged. — Ed.

2 3 Ves. 253.

3 1 Y. & Jerv. 427; 2 Y. & Jerv. 372. So *Ex parte* Sutton, 2 Rose, 86. Several of the older cases are *contra*: Dreke *v.* Mayor of Exon, 2 Freem. 183; Vandernanker *v.* Disbrough, 2 Vern. 97; Moyses *v.* Little, *Ibid.* 194. See also Willingham *v.* Joyce, 3 Ves. 168; Boardman *v.* Mostyn, 6 Ves. 467; Buckland *v.* Hall, 8 Ves. 92; and O'Herlihy *v.* Hedges, 1 Scho. & Lef. 123.

4 12 Ves. 504.

5 8 T. R. 57, 300.

6 8 T. R. 59.

7 Morgan *v.* Rhodes, 1 M. & K. 435; Buckland *v.* Papillon, L. R. 1 Eq. 477, 2 Ch. Ap. 67; Gannett *v.* Albree, 103 Mass. 372 (*semble*).

HOUSE *v.* JACKSON.

SUPREME COURT, OREGON, APRIL 24, 1893.

[24 *Oregon Reports*, 89.]

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit brought by the appellant against the respondents to compel the specific performance of a contract to sell real property, contained in an indenture of lease dated January 19, 1887, between Ellen L. Jackson and William R. Jackson, lessors, and John B. Haley, lessee. By this indenture the Jacksons agreed to sell and convey the demised premises to Haley at any time before the "expiration of the lease for $2500. Both parties to the indenture bound themselves, their heirs and executors, to the agreements therein contained."

It appears that J. B. Haley went into possession and occupied said premises and paid the rent due thereon until about November 30, 1889, when, in consideration of two hundred dollars, he assigned all his interest therein to one W. G. Pomeroy; that Pomeroy went into possession, paid the rent, and occupied the premises until about September 12, 1890, when in consideration of five hundred dollars, he assigned all his interest therein to D. Reghitto and plaintiff, who went into possession thereof; that said Reghitto about December —, 1891, assigned his interest to plaintiff, who continued to occupy the premises, and paid the rent due thereon, and on January —, 1892, tendered to defendants two thousand five hundred dollars, and demanded a deed thereto; that the defendants refused to accept said tender, or to execute said deed, whereupon plaintiff deposited said amount with the clerk and commenced this suit. After the issues were completed the cause was referred to Geo. A. Brodie, Esq., who found that the equities were with the plaintiff, and that he was entitled to a decree, but the court set aside said findings, and entered a decree dismissing the complaint, from which the plaintiff appeals.

To support the decree the respondents contend: *Third*,[1] such contracts cannot be enforced by an assignee.

The option having been given to Haley, could he transfer his right so that his assignee could enforce the same? The ground upon which a court enforces an executory contract for the sale of lands is that equity considers things agreed to be done as actually performed; and when an agreement has been made for the sale of lands, the vendor is deemed the trustee of the purchaser of the estate sold, and the purchaser as trustee of the purchase money for the vendor. The vendee, in equity, is actually seized of the estate, and, as a consequence, may sell the same before a conveyance has been executed,

[1] Only so much of the opinion is given as relates to the plaintiff's right as an assignee The court's statement of the facts is abridged. — ED.

notwithstanding an election to complete the purchase rests entirely with the purchaser, Kerr *v.* Day.[1] Haley had an estate in the premises, and was equitably the owner thereof, and could transfer this right, and his assignee can enforce the option to the same extent as his assignor.[2]

The decree of the court below will be reversed, and a decree here entered for the specific performance of the contract.

WARREN WASS *v.* HARRIET A. MUGRIDGE.

SUPREME JUDICIAL COURT, MASSACHUSETTS, FEBRUARY 27, 1880.

[128 *Massachusetts Reports*, 394.]

BILL in equity, filed May 14, 1877, to compel the defendant to deliver to the plaintiff a deed of certain real estate in Stoneham.

ENDICOTT, J.[3] The plaintiff took a deed of the land from Andrew J. Leighton and George F. Leighton in 1873. At this time one undivided half thereof was owned by Elizabeth H. Soule, to whom it had been conveyed in 1871, in trust for the defendant during her life, and at her decease to other persons in fee. The consideration of this deed was paid by the defendant, the purchase was made for her benefit, and it is conceded that she had practically the control of the premises thus conveyed. Before the conveyance was made to the plaintiff, the defendant agreed to sell this undivided half for $350 in cash to George F. Leighton; and about the time of the conveyance to the

[1] 14 Pa. St. 112.

[2] The right of the assignee of a vendee to enforce specific performance of the vendor's contract to convey is well established. Lawes *v.* Bennett, 7 Ves. 436, cited; Brown *v.* London Co., 6 W. R. 188; Hays *v.* Hall, 4 Port. (Ala.) 374; Weise *v.* Meyer, (Arkansas, 1886) 1 S. W. R. 679; Owen *v.* Frink, 24 Cal. 171; Hunt *v.* Hayt, 10 Colo. 278; Robinson *v.* Perry, 21 Ga. 183; Perry *v.* Paschal, 103 Ga. 134; Perkins *v.* Hadsell, 50 Ill. 216; Fitzhugh *v.* Smith, 62 Ill. 486 (assignee under execution sale); Corbus *v.* Teed, 69 Ill. 205; Miller *v.* Whittier, 32 Me. 203; Ricker *v.* Moore, 77 Me. 292; Maughlin *v.* Perry, 35 Md. 352; Ensign *v.* Kellogg, 4 Pick. 1; Currier *v.* Howard, 14 Gray, 511; Weyner *v.* Cheney, 16 Neb. 202, 33 Neb. 310; Rice *v.* Gibbs, 33 Neb. 460, 40 Neb. 264; Ewing *v.* Gordon, 49 N. H. 444; Robbins *v.* McKnight, 5 N. J. Eq. 642; Kerr *v.* Day, 14 Pa. 112. Similarly the assignee of a business may enforce by injunction a promise to his assignor not to carry on a competing business. Benwell *v.* Innes, 24 Beav. 307; California Co. *v.* Wright, 6 Cal. 258, 8 Cal. 585; Hedge *v.* Lowe, 47 Iowa, 137; Guerand *v.* Dandelet, 32 Md. 562; Watrous *v.* Allen, 57 Mich. 362; Diamond Co. *v.* Roeber, 106 N. Y. 473; Francisco *v.* Smith, 143 N. Y. 488; Morgan *v.* Perhamus, 36 Oh. St. 517; Reece *v.* Hendricks, 1 Leg. Gaz. R. 79.

In Francisco *v.* Smith, *supra*, Earle, J., delivering the opinion of the court, said (p. 493): "Such an agreement is a valuable right in connection with the business it was designed to protect, and going with the business it may be assigned, and the assignee may enforce it just as the assignor could have enforced it if he had retained the business. Diamond Match Co. *v.* Roeber. The agreement can have no independent existence or vitality aside from the business. If Mr. Francisco had not disposed of the business, and had not himself carried it on, there would have been nothing for the agreement to operate upon — no grounds for equitable relief against a breach thereof, or for recovery in an action at law of anything except possibly nominal damages." — ED.

[3] Only the opinion of the court is given. — ED.

plaintiff, in July, 1873, a deed of the undivided half was drawn up, the consideration named therein being $350. It was signed and acknowledged by Elizabeth H. Soule, and was also signed by Sarah W. Soule, who was entitled to a share in the reversion on the death of the defendant; but it was never signed by the defendant, and has since remained in her possession. The master has found that the defendant, about the same time, accepted the note of George F. Leighton for $350, as the consideration for the conveyance, which note was afterwards signed by Andrew J. Leighton. This note has never been paid by the Leightons, and the defendant in her answer avers her willingness, upon payment or proper security being given therefor, to execute and deliver the deed.

It is evident, upon this state of facts, that, whatever might be the rights of the Leightons at law, they would not be entitled in equity to specific performance of their contract with the defendant, except upon payment of the money due upon the note. The plaintiff by his bill seeks to compel the defendant to deliver this deed to him, and to assign and convey to him all her interest in the estate, and to secure to him a perfect title, so far as it is in her power to do so; and failing so to secure him to make compensation in damages. But he has not paid and does not tender payment of the note; and contends that he is entitled to the deed without payment.

The defendant has made no contract with the plaintiff; and assuming that the plaintiff, as grantee of the Leightons, could maintain a bill to enforce such rights as they had under their contract with the defendant for a conveyance, yet it is plain he can have no greater rights than they had, and that he is bound to do all which they would be required in equity and good conscience to perform before obtaining a conveyance. Love *v.* Sortwell.[1] As he does not offer to do this, the decree from which he appeals must stand. *Decree affirmed.*[2]

JOHN COMSTOCK *v.* WILLIS M. HITT.

SUPREME COURT, ILLINOIS, APRIL TERM, 1865.

[37 *Illinois Reports*, 542.]

MR. JUSTICE BREESE delivered the opinion of the court:[3]

The facts of this case as shown by the record are briefly these: Heman Baldwin, being the owner of certain lots of ground in the city

[1] 124 Mass. 446.

[2] Love *v.* Sortwell, 124 Mass. 446; Rice *v.* Gibbs, 40 Neb. 264 *Accord.* If both parties to the contract are citizens of the same State, the assignee of either, although a citizen of another State, cannot proceed for specific performance in a federal court, because the jurisdiction of the federal court in suits upon *choses in action* is determined by the citizenship of the obligor and obligee. Corbin *v.* Black Hawk Co., 105 U. S. 659; Plant Co. *v.* Jacksonville Co., 152 U. S. 71. — ED.

[3] Only the opinion of the court is given. — ED.

of LaSalle, on the 13th of July, 1857, executed and delivered to Mrs. Ann C. Wilson a bond for a deed of the same, on certain money considerations thereafter to be paid, for which he received the notes of Mrs. Wilson. The first note was duly paid, and two hundred dollars paid on the third note. On the 15th of March, 1860, Wilson being in default, Baldwin conveyed the lots to Messrs. Dean & Blanchard, and assigned the overdue notes of Wilson to them. Dean & Blanchard, on the 2d of December, 1861, conveyed the premises to the defendant in error, by quitclaim deed for the consideration of sixty dollars, and at the same time delivered the second and third notes of Wilson to him.

Previous thereto, Mrs. Wilson and her husband James H. Wilson, on or about the 18th of December, 1858, for a valuable consideration, by warranty deed duly executed and acknowledged, conveyed the premises to the plaintiff in error, and delivered him the title bond of Baldwin and the first note, which they had paid. This deed recites that "it was and is subject by the terms thereof to the said bond." The language of the deed is, "subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named."

The bill is filed to compel plaintiff in error to pay these outstanding notes of Mrs. Wilson, and it is elaborately and ably argued by the defendant's counsel, that this obligation rests upon the plaintiff in error, and so the Circuit Court decreed. This is the only important question presented by the record.

There is no sufficient proof that the plaintiff in error ever covenanted or agreed to pay these notes when he took the deed from Wilson and wife. The only pretence for such claim seems to arise from the language used in the deed from Wilson and wife to the plaintiff in error, "subject, nevertheless, to the bond of Heman Baldwin to Ann C. Wilson, the grantor above named."

The defendant in error has cited many cases supposed to be authority on this point, which we have examined.

The first case of Townsend *v.* Ward *et al.*[1] was a case of exchange of lands, one parcel being incumbered by a mortgage of twelve thousand dollars. In the deed for the land thus incumbered is this clause, "which said mortgage, the said K. hereby assumes and agrees to pay, as part of the consideration money named herein." K., the purchaser, went into possession and exercised acts of ownership over the land from April to November, without any suggestion of any objection on his part to the terms of the deed. In November, he returned the deed to the grantor, stating that he refused to accept it, and should not perform the contract on his part. The court held him to a compliance, on a bill filed for that purpose, deciding that the retention of the deed so long a time was an acceptance of it. And the court also said where land is conveyed subject to a mortgage, the amount of which is allowed to the purchaser by a reduction from the price of the land, the law implies a promise on his part to indemnify the grantor against the mortgage debt.

[1] 27 Conn. 610.

This case is wholly variant from the case before us, as there was no agreement to pay the outstanding notes, nor were they considered in fixing the price of the lots. And at any rate, if there be any obligation whatever resting on the plaintiff in error, it is to his grantors, Wilson and wife, and not to the defendant in error.

Halsey *v.* Reed [1] is a similar case, where there was an agreement to pay off the mortgage and its amount deducted from the purchase price.

All the cases cited on this point are to the same effect. Where the payment of an outstanding mortgage is part of the purchase price of the land, the law will imply an agreement to pay it. This case is entirely different. Here a title bond was executed, and the plaintiff in error, the grantee of the holder of this bond, took the lots subject to that bond, that is to say, on paying the obligor in the bond he could compel the execution of a deed to him. This is the whole extent of this clause in the deed from Wilson and wife to plaintiff in error. He is told the legal title is in Baldwin. Now we sell to you with that understanding, and if you pay Baldwin the balance due him, you will obtain the legal title. Baldwin's title bond was not an outstanding incumbrance on the lots in any legal sense which the purchaser from Wilson was bound, *nolens volens*, to discharge. Wilson merely sold his bargain to the plaintiff in error, and he had the option to pay the bond or not, as his interests might prompt. If he does not pay the notes, he can get no title to the lots, and that is the whole sum and substance of it. If A bargains with B to pay him one thousand dollars for a piece of land, at a future day, until A does pay he cannot compel B to convey, and the same is the condition of the assignee or grantee of A.

We can perceive no principle of law, justice, or equity requiring the plaintiff in error to pay these notes. Because he has taken a deed for the premises subject to the terms of a title bond, and without any promise to pay them, there can be no rule of law subjecting him to their payment.[2] By taking the deed of the Wilsons, he stepped into their shoes, and on payment of the notes, he could compel a deed. This is the attitude in which he is placed. Taking a deed "subject to an outstanding mortgage," creates no personal liability on the grantee to pay off the incumbrance, unless he has specially agreed so to do, or the amount of the mortgage has been deducted from the purchase price. This is the extent to which the authorities cited go, and no farther. The land is the primary fund between all the parties, for the payment of the debt secured by it.

That part of the decree which requires the plaintiff in error to pay the balance of the purchase money, if any remains due after a sale of the lots, is reversed, and the decree will stand simply for a sale of the premises to pay the purchase money, they being subject to such lien. The decree is, therefore, modified.

Decree reversed in part, and modified.

1 9 Paige, 452.

2 Corbus *v.* Teed, 69 Ill. 205; Consolidated Co. *v.* Peirs, 166 Ill. 361, 370; Jobbins *v.* Gray, 34 Ill. Ap. 208 *Accord.* — Ed.

HANNA *v.* WILSON.

Court of Appeals, Virginia, July Term, 1846.

[3 *Grattan*, 243.]

In December, 1843, Joseph Hanna filed his bill in the Superior Court of the county of Greenbrier, against James B. Wilson and David Watts, in which he charged that Wilson, by a certain writing duly executed, on the 5th of November, 1838, bound himself to pay to David Watts the sum of 154 dollars 34 cents, and that Watts had assigned the same to the plaintiff, for value. That this debt was a part of the purchase money of a tract of land sold by Watts to Wilson. That Watts had executed a deed to Wilson for the land, and tendered it to him, and demanded the purchase money, but that Wilson neglects and fails to pay it. He therefore prays that the land, or so much thereof as may be necessary, may be decreed to be sold in satisfaction of his debt and interest, and the costs of this suit, and for general relief. And he files the deed from Watts to Wilson with his bill, as an exhibit. Wilson answered the bill admitting his indebtedness, but set up the statute of limitations as a bar.

The court sustained the defence of the statute of limitations and dismissed the bill; whereupon Hanna applied to this court for an appeal, which was allowed.[1]

Allen, J., delivered the opinion of the court.

The court is of opinion, that as by the contract between David Watts and James B. Wilson, the former was only bound to make a deed for the land upon the payment of the purchase money, it would have been competent for the vendor at any time whilst he retained the legal title as a security for the payment of the purchase money, to have filed a bill for the specific execution of the contract; and to subject the land to sale, for the purchase money in arrear; and this right in equity, under such circumstances, could not be affected by any lapse of time, short of the period sufficient to raise the presumption of payment; whatever might be the operation of the statute of limitations in an action at law brought to recover the purchase money. The court is further of opinion, that it was competent for the assignee for value of the note given for the purchase money, by a bill against his assignor, the vendor, and the vendee, to enforce the specific execution of the contract, in a case proper for such relief, for his benefit, and to obtain satisfaction of the amount due to him by subjecting the land to sale for the payment thereof. And it appearing from the papers in the cause, that the defendant Watts, as to whom the bill was taken for confessed, has complied with the contract on his part, by executing and acknowledging a deed for the land sold, to be de-

[1] The statement of the case is slightly abridged, and the arguments of counsel are omitted. — Ed.

livered to the vendee on his paying the purchase money; and the affirmative allegations of the answer, that the deed is not in pursuance of the contract, being unsupported by proof, the court on the hearing, under the prayer for general relief, should have decreed a specific execution of the contract, instead of dismissing the bill with costs. It is therefore considered that said decree is erroneous, and should be reversed with costs.

And this court proceeding, etc., doth adjudge, order, and decree, that the plaintiff recover of the said James B. Wilson, the sum of 154 dollars 34 cents, with interest thereon from the 5th day of November, 1838, until paid, and his costs by him about the prosecution of his suit in this behalf expended; and upon the payment of said debt, interest, and costs, it is further ordered that the clerk do deliver to the said James B. Wilson the original deed filed as an exhibit with the bill, retaining a certified copy thereof to be filed with the papers in the cause. And it is further adjudged, ordered, and decreed, that unless the said J. B. Wilson shall pay to the plaintiff the debt, interest, and costs aforesaid, within sixty days after the entering of this decree, the sheriff of Greenbrier County, after advertising the time and place of sale by advertisement published, etc., and posted, etc., for four weeks successively, do proceed before the court-house of said county, on some court day, to sell said land in said deed described, upon a credit of six and twelve months, taking from the purchaser bond and security, and retaining a lien on the land for the security of the purchase money; and report his proceedings in order to a final decree.

JACKSON'S CASE.

In the Exchequer, Trinity Term, 1609.

[*Lane*, 60.]

Upon a motion made by Sir John Jackson in a suit by English bill, between Jackson and another, Tanfield [C. B.] said, that it had been decreed in the chancery, betwixt one Gore and Wiglesworth, that if A. agree with me to lease Black-Acre for certain years to me, and after, before he makes my lease according to his promise, he infeoffs B. of that acre for a valuable consideration, and B. had notice of this promise, before the feoffment made unto him, now B. should be compelled in the chancery to make this lease to me, according to the promise, and by reason of his notice, and so the court agreed upon a motion made in the like case, by the said Jackson, for as before the statute 27 H. 8 a feoffee upon valuable consideration, should be compellable in the chancery to execute an use, whereof he had notice, so here.[1]

1 Taylor *v.* Stibbert, 2 Ves. Jr. 437; Meux *v.* Maltby, 2 Sw. 277; Smith *v.* Phillips,

FRANK BIRD *v.* JOHN HALL AND ANOTHER.

SUPREME COURT, MICHIGAN, OCTOBER 20, 1874.

[30 *Michigan Reports*, 374.]

COOLEY, J. A short statement of this case, as it is set forth in the bill, is, that Bird contracted to purchase a lot of land of Hall, and has partly paid for it; that he then contracted to sell the same land to McFee, who also paid for it in part and was put in possession, the balance of the purchase price not being yet due; that Hall then, in disregard of complainant's rights, has given McFee a conveyance; that McFee is irresponsible, and complainant by this conveyance is deprived of his security for the balance which is to become due to him hereafter from McFee; and the bill prays that McFee be decreed to convey to complainant in specific performance of the contract of Hall, in whose shoes as his assignee he now stands.

It seems clear that a conveyance as prayed by the bill would be strictly equitable, as it would place the parties where they have agreed to place themselves by their contracts. Complainant was entitled to a conveyance from Hall on payment of the balance due him, which he has offered to make, and he was then entitled to hold the title until he is paid in full by McFee. This is conceded by defendants, but they insist that complainant has at law an ample remedy against Hall, if he suffers a loss in consequence of Hall's conveyance to McFee, and that as it is not alleged that Hall is irresponsible, there is no sufficient ground for equitable interference.

What complainant loses by this conveyance is his security for the ultimate payment by McFee. Whether a loss of the security would result in loss of the debt cannot yet be determined, and any present right of action at law against Hall would give him nominal damages only. A right of action against him at a future day, after the personal remedy against McFee had proved ineffectual, might or might not find him in condition to respond, even if it be conceded that at present he is entirely responsible. Complainant cannot justly be compelled to run this risk. These parties cannot be allowed to deprive him of his security and turn him over to the contingencies of successive suits at law after his demand has matured. He has a right to be protected against the suits and the contingencies by having ample and effectual security in his own hands, and the remedy in equity was alone adequate to the case.

1 Keen, 694; Hersey *v.* Giblett, 18 Beav. 174; Mumford *v.* Stohwasser, 18 Eq. 556; Reilly *v.* Garnett, Ir. R. 7 Eq. 1; Ash *v.* Hare, 73 Me. 401 *Accord*. In Meux *v.* Maltby, *supra*, it was impossible to compel the execution of a lease by the grantee of the promisor, because the grantee being a joint-stock company, unincorporated, the title was vested in a great number of persons, whose names and residences in many instances were not ascertainable. The court gave a decree declaring the right of the plaintiff and restraining the treasurer of the company, in whose name, by statute, the company brought actions, from taking any proceeding to disturb the plaintiff's possession of the premises. — ED.

The decree must be reversed with costs, and the cause remanded, with directions to the court below to overrule the demurrer and allow the defendant McFee to answer.

The other justices concurred.[1]

CASSEY *v.* FITTON.

In Chancery, before Lord Nottingham, C., February 31, 1679.

[2 *Hargrave, Juridical Arguments*, 296.]

Thomas Cassey, the father, had two sons by several venters, John and William. John being sickly and childless, the father was unwilling to let his estate descend to John, because it would not descend from him to William by the second venter; and therefore intended to make some settlement, and to limit a remainder to William: which John perceiving desired his father to forbear making any settlement, and promised his father, that if he would leave the land to descend, he would alien no part of it more than what was necessary for payment of debts, but *would leave all the rest to his younger brother*. Whereupon the father did forbear to settle and died. After this John made a will, and left all to his brother Wil-

[1] It is well settled that a buyer, who is entitled to call for a conveyance from his vendor, may have the same relief from his vendor's grantee if the latter acquired the title with notice of the prior contract. Jennings *v.* Moore, 2 Vern. 609; Lawes *v.* Bennett, 7 Ves. 436 (cited); Daniels *v.* Davison, 17 Ves. 433, 16 Ves. 253; Lightfoot *v.* Heron, 3 Y. & C. 586; Potter *v.* Sanders, 6 Hare, 1; Shaw *v.* Thackray, 1 Sm. & G. 537; Crofton *v.* Ormsby, 2 Sch. & Lef. 583; Waldron *v.* Jacob, Ir. R. 5 Eq. 131; Moore *v.* Crawford, 130 U. S. 122; Bryant *v.* Booze, 55 Ga. 438; Dement *v.* Bonham, 26 Ill. 158; Chicago Co. *v.* Hay, 119 Ill. 507; Hunter *v.* Bales, 24 Ind. 299; Walker *v.* Cox, 25 Ind. 271; Keegan *v.* Williams, 22 Iowa, 378; Gregg *v.* Hamilton, 12 Kan. 333; Wilson *v.* Emig, 44 Kan. 125; Topeka Co. *v.* Root, 56 Kan. 187; Lee *v.* Durret, 4 Bibb, 20; Foss *v.* Haynes, 31 Me. 81; Cross *v.* Bean, 83 Me. 61; White *v.* Mooers, 83 Me. 62; Smoot *v.* Rea, 19 Md. 398; Maughlin *v.* Perry, 35 Md. 352; Clark *v.* Flint, 22 Pick. 231 (contract to sell a ship); Andrews *v.* Brown, 3 Cush. 130 (*semble* — contract to sell a ship); Murphy *v.* Marland, 8 Cush. 575; Connihan *v.* Thompson, 111 Mass. 270; Mansfield *v.* Hodgdon, 147 Mass. 304; Le Fleur *v.* Chace, 171 Mass. 59 (*semble* — relief denied against a *bona fide* purchaser); Farwell *v.* Johnston, 34 Mich. 342; Lovejoy *v.* Potter, 60 Mich. 95; Hines *v.* Baine, Sm. & M. Ch. 530; Carson *v.* Percy, 57 Miss. 97; Thompson *v.* Henry, 85 Mo. 451; Hughes *v.* Reese, 22 Neb. 78; Young *v.* Young, 45 N. J. Eq. 27; Page *v.* Martin, 46 N. J. Eq. 585; Wadsworth *v.* Wendell, 5 Johns. Ch. 224; Laverty *v.* Moore, 33 N. Y. 658; Merithew *v.* Andrews, 44 Barb. 200; Post *v.* West Shore Co., 123 N. Y. 580; Longworth *v.* Mitchell, 26 Oh. St. 336; Kerr *v.* Day, 14 Pa. 112; White *v.* Patterson, 139 Pa. 429; Otis *v.* Payne, 86 Tenn. 663; McKee *v.* Barley, 11 Grat. 340; Neel *v.* Neel, 80 Va. 584; Bates *v.* Swiger, 40 W. Va. 420.

The rule is the same if the grantee, though having no notice of the prior agreement, gave no value for the conveyance. Martin *v.* Seemore, 1 Ch. Ca. 170; Young *v.* Young, 45 N. J. Eq. 27, 51 N. J. Eq. 491; Caborn *v.* Godfrey, 3 Dess. 514; McCullom *v.* Mackrell, 13 S. Dak. 262.

Bankruptcy of the vendor or vendee. — Specific performance may be enforced against the vendor's assignee in bankruptcy. *Re* Kerkham, 80 Law Times, 322; Pearce *v.* Bastable, 1901, 2 Ch. 122; Sweyson *v.* Rouse, 65 N. Ca. 34 (*semble*). But specific performance will not be decreed against the vendee's assignee in bankruptcy. Holloway *v.* York, 25 W. R. 627; Pearce *v.* Bastable, 1901, 2 Ch. 122, 125. — Ed.

liam. But recovering again, he made a new will, and gave all to the defendant in trust as is supposed for superstitious uses, the will being drawn by Father Conyers the fugitive. The defendant sells the land to Farmer another defendant for 5000*l.* The plaintiff exhibited his bill against the executors, devisees and purchaser. And upon this agreement proved, it was decreed to be performed; and that, after debts paid and incumbrances cleared, the residue of the purchase-money should be paid to the plaintiff.[1]

1 "While an agreement to make a certain disposition of property by last will is one which, strictly speaking, is not capable of a specific execution,(*a*) yet it has been held to be within the jurisdiction of a court of equity to do what is equivalent to a specific performance of such an agreement, by requiring those, upon whom the legal title has descended, to convey the property in accordance with its terms. 3 Pars. on Cont. 405. And the court will not allow this *post mortem* remedy to be defeated by any device inconsistent with the agreement." Per LEWIS, J., in Colby *v.* Colby, 81 Hun, 221. In accordance with this principle the beneficiary in a contract to devise land has been allowed to recover it from devisees, heirs, or grantees to whom the promisor, in breach of his contract, has devised it or suffered it to descend, or conveyed it by act *inter vivos*.

From devisees: Goilmer *v.* Battison, 1 Vern. 48, 2 Vent. 353 s. c.; Durour *v.* Perraro, 2 Harg. Jur. Arg. 304, 309, 1 Dick. 319 s. c. (before Lord Camden); Needham *v.* Smith, 4 Russ. 318; Fitzgerald *v.* Fitzgerald, 20 Grant, Ch. 410; Crofut *v.* Layton, 68 Conn. 91; Mundorff *v.* Kilbourn, 4 Md. 459, 463 (*semble*); Gould *v.* Mansfield, 103 Mass. 408 (*semble*); Johnson *v* Hubbell, 10 N. J. Eq. 332; Young *v.* Young, 45 N. J. Eq. 27; Brantingham *v.* Huff, 43 N. Y. Ap. Div. 414; Taylor *v* Mitchell, 87 Pa. 518; Gary *v.* James, 4 Dess. 185; Fogle *v.* St. Michael Church, 48 S. C. 86; Turnipseed *v.* Sirrine, 57 S. C. 559.

From heirs: McKinnon *v.* McKinnon, 56 Fed. R. 409; Manning *v.* Pippen, 86 Ala. 357; Maddox *v.* Rowe, 23 Ga. 431; Smith *v.* Yocum, 110 Ill. 142; Mauck *v.* Melton, 64 Ind. 414; Newton *v.* Newton, 46 Minn. 33 (a promissory note); Anding *v.* Davis, 38 Miss. 574; Sutton *v.* Hayden, 62 Mo. 101; Hiatt *v.* Williams, 72 Mo. 214; Kofka *v.* Rosicky, 41 Neb. 328; Vreeland *v.* Vreeland, 53 N. J. Eq. 387; Winne *v.* Winne, 166 N. Y. 263; Gates *v.* Gates, 34 N. Y. Ap. Div. 609; Lothrop *v.* Marble, 12 S. Dak. 511; Brinton *v.* Van Cott, 8 Utah, 480; Smith *v.* Pierce, 65 Vt. 200; Hale *v.* Hale, 90 Va. 728.

From grantees by act inter vivos: Whiton *v.* Whiton, 179 Ill 32, 76 Ill. Ap. 553; McGuire *v.* McGuire, 11 Bush, 142; Van Dyne *v.* Vreeland, 11 N. J. Eq. 370, 12 N. J. Eq 142; Davidson *v.* Davidson, 13 N. J. Eq. 246; Pflugar *v.* Pultz, 43 N. J. Eq. 400; Parsell *v.* Stryker, 41 N. Y. 480; East *v.* Dolihite, 72 N. C. 562 (*semble*); McCullom *v.* Mackrell, 13 S. Dak. 262.

In the cases cited in the preceding paragraph, the beneficiary obtained relief after the death of the person who contracted to make the devise. In the following cases, bills were sustained against grantees before the promisor's death, and decrees obtained directing the grantee to hold the land for the promisor until the latter's death, and then to convey to the beneficiary. Gupton *v.* Gupton, 47 Mo. 37; Van Dyne *v.* Vreeland, 11 N. J. Eq. 370, 12 N. J. Eq. 142; Davidson *v.* Davidson, 13 N. J. Eq. 246; Pflugar *v.* Pultz, 43 N. J. Eq. 400; Duvale *v.* Duvale, 54 N. J. Eq. 581, 56 N. J. Eq. 375; Green *v.* Broyles, 3 Humph. 167 (*semble*).

Contract to make a legacy: A contract to bequeath a certain amount of money or a certain proportion of his assets is a valid contract and enforceable against his estate like any other claim. Gregor *v.* Kemp, 3 Sw. 404; Jones *v.* Martin, 5 Ves. 266; Logan *v.* Wienholt, 1 Cl. & F. 611 (specialty creditor); Hammersley *v.* De Biel, 12 Cl. & F. 45; Maddison *v.* Alderson, 8 App. Cas. 467 (*semble*); Bolman *v.* Overall, 80 Ala. 451; Svanbwog *v.* Fosseen, 75 Minn. 350; Wright *v.* Tinsley, 30 Mo. 389; Healey *v.* Simpson, 113 Mo. 340; Nowack *v.* Berger, 133 Mo. 24; Clark *v.* Cordy, 69 Mo. Ap. 6; Riley *v.* Allen, 54 N. J. Eq. 495; Thompson *v.* Stevens, 71 Pa. 161; Cottrell's Est. 11 Phila. 93; Rice *v.* Hartman, 84 Va. 251.

Contract not to make a will: A contract not to make a will being in effect a contract that one's land shall descend to his heirs, the latter, as the beneficiaries, may compel a devisee to surrender the land devised to him. Taylor *v.* Mitchell, 87 Pa. 518. — ED.

(*a*) Bourget *v.* Monroe, 58 Mich. 563, 565; Turnipseed *v.* Sirrine, 57 S. C. 559, 578. Doubtless a contract not to revoke a will would not be enforced by an injunction. But an action will lie for the breach of such a contract. Robinson *v.* Ommanney, 21 Ch. D. 780; McCormick *v.* McRae, 11 Up. Can. Q. B. 187. — ED.

TULK *v.* MOXHAY.

In Chancery, before Lord Cottenham, C., December 22, 1848.

[2 *Phillips*, 774.]

In the year 1808 the plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the Square, sold the piece of ground by the description of "Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stone work round the same," to one Elms in fee: and the deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns, with the plaintiff, his heirs, executors, and administrators, "that Elms, his heirs, and assigns should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing round the same in its then form, and in sufficient and proper repair as a Square Garden and Pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said Square Garden and Pleasure Ground."

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with his vendor: but he admitted that he had purchased with notice of the covenant in the deed of 1808.

The defendant having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who still remained owner of several houses in the Square, filed this bill for an injunction; and an injunction was granted by the Master of the Rolls, to restrain the defendant from converting or using the piece of ground and Square Garden, and the iron railing round the same, to or for any other purpose than as a Square Garden and Pleasure Ground in an open state, and uncovered with buildings.

On a motion, now made, to discharge that order.

Mr. *R. Palmer*, for the defendant.[1]

The Lord Chancellor (without calling upon the other side).

That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract: the owner of certain houses in the square

[1] The argument for the defendant is omitted. — Ed.

sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement, and no covenant, this court would enforce it against a party purchasing with notice of it;[1] for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. There are not only cases before the Vice-Chancellor of England, in which he considered that doctrine as not in dispute; but looking at the ground on which Lord Eldon disposed of the case of the Duke of Bedford *v.* The Trustees of the British Museum,[2] it is impossible to suppose that he entertained any doubt of it. In the case of Mann *v.* Stephens,[3] before me, I never intended to make the injunction depend upon the result of the action: nor does the order imply it. The motion was, to discharge an order for the commitment of the defendant for an alleged breach of the injunction, and also to dissolve the injunction. I upheld the injunction, but discharged the order of commitment, on the ground that it was not clearly proved that any breach had been committed; but there being a doubt whether part of the premises on which the defendant was proceeding to build was locally situated within what was called the Dell, on which alone he had under the covenant a right to build at all, and the plaintiff insisting that it was not, I thought the pendency of the suit ought not to prejudice the plaintiff in his right to bring an action if he thought he had such right, and, therefore, I gave him liberty to do so.

With respect to the observations of Lord Brougham in Keppell *v.* Bailey he never could have meant to lay down, that this court would not enforce an equity attached to land by the owner, unless under

[1] Keates *v.* Lyon, 4 Ch. 218, 222 (*semble*); Catt *v.* Tourle, 4 Ch. 654, 656–7 (*semble*); Mackenzie *v.* Childers, 43 Ch. D. 265, 275; Carter *v.* Williams, 9 Eq. 678; Whitney *v.* Union Co., 11 Gray, 359, 364 (*semble*); Trustees *v.* Lynch, 70 N. Y. 440, 447 (*semble*) *Accord.* — Ed.

[2] 2 My. & K. 552.

[3] 15 Sim. 377.

such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it.

I think the cases cited before the Vice-Chancellor and this decision of the Master of the Rolls perfectly right, and, therefore, that this injunction [motion ?] must be refused with costs.[1]

JOHN BROTHERS ABERGARW BREWERY COMPANY *v.* HOLMES.

IN CHANCERY, BEFORE KEKEWICH J., DECEMBER 13, 1899.

[*Law Reports*, 1900, 1 *Chancery*, 188.]

WITNESS ACTION.

This was an action for an injunction to restrain the defendant from selling, disposing of, or supplying for consumption, either on or off the Tondû Arms, Tondû, Glamorgan, any fresh beer, Burton ales, or "John Brothers" bitter or stout, or any wines or spirituous liquors other than such as should have been supplied by the plaintiffs.

By a first mortgage dated September 24, 1891, John Jenkins, of the Tondû Arms, publican, demised the Tondû Arms and other hereditaments to M. A. Blankensee, L. H. Blankensee, and I. Silverston for the residue of certain terms of eighty years and seventy-two years respectively (less the last two days thereof respectively), except the last ten days thereof respectively, by way of mortgage for securing the repayment of a sum of 1000*l.* with interest at the rate therein mentioned.

By a second mortgage of the same date John Jenkins demised the same premises for the same term to Morgan John and William John, trading in copartnership as "John Brothers" at Abergarw, brewers and wine and spirit merchants to secure the repayment of 550*l.* advanced by John Brothers.

By a deed of covenant, of the same date, executed in consideration of the advance by John Brothers, John Jenkins covenanted with John Brothers, their executors, administrators, and assigns, that he John Jenkins, his executors, administrators, or assigns, did, for so long as

[1] Mann *v.* Stephens, 15 Sim. 377; Parker *v.* Whyte, 1 H. & M. 167; Piggott *v.* Stratton, 1 D. F. & J. 33, Johns. 341; Joy *v.* Richardson, 30 Beav. 563; Wilson *v.* Hart, 1 Ch. Ap. 463; Western *v.* McDermott, 2 Ch. Ap. 72; Catt *v.* Tourle, 4 Ch. 654; Cooke *v.* Chilcott, 3 Ch. D. 694; Rice *v.* Noakes, 1900, 1 Ch. 213, 219 (*semble*); Frye *v.* Partridge, 82 Ill. 267; Robbins *v.* Webb, 68 Ala. 393, 77 Ala. 176; McMahon *v.* Williams, 79 Ala. 288; Lynn *v.* Mt. Savage Co., 34 Md. 603, 638; Whitney *v.* Union Co., 11 Gray, 359; Winnipesaukee Co. *v.* Gordon, 63 N. H. 505; Manhattan Co. *v.* N. J. Co., 23 N. J. Eq. 161; Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206; Coudert *v.* Sayre, 46 N. J. Eq. 386, 391, 392 (*semble*); Hayes *v.* Waverly Co., 51 N. J. Eq. 345; Cornish *v.* Wiessman, 56 N. J. Eq. 610; Trustees *v.* Lynch, 70 N. Y. 440; Round Lake Ass'n *v.* Kellogg, 141 N. Y. 348; R. R. Co. *v.* R. R. Co., 170 Pa. 284; Fuller *v.* Arms, 45 Vt. 400 *Accord.* — ED.

he or they should remain, continue, and be in the possession and occupation of the Tondû Arms, bind the Tondû Arms to John Brothers, for the entire supply for consumption, either on or off the said premises, of fresh beer, Burton ales, and "John Brothers" bitter and stout, at the prices therein mentioned. And John Jenkins further covenanted with John Brothers that he, his executors, administrators, or assigns, would procure and purchase from them all wines and spirituous liquors sold out of, or consumed on or off, the said premises and supplied therefrom, he and they duly paying for the said beer at the before-mentioned prices, and wines and spirits on the usual trade terms.

Subsequently, but prior to September 22, 1896, the first mortgage was transferred to John Thomas, and the second mortgage with the benefit of the deeds of covenant was assigned to the plaintiffs, a company that had purchased the businesses previously carried on by John Brothers, together with the premises belonging thereto and the good-will, debts, and assets thereof; and the equity of redemption was assigned to Evan Thomas.

By an underlease dated September 22, 1896, John Thomas and Evan Thomas demised to the defendant, Holmes, for the term of nine years, and the underlessee covenanted with John and Evan Thomas to buy of the plaintiffs or their nominees all wines and liquors vended or consumed on the said premises during the underlease.

The defendant having bought, and intending to buy, beer, wines, and spirits from persons other than the plaintiffs, the plaintiffs issued a writ in the present action on April 27, 1899.[1]

Kekewich J., I have now to deal with some neat questions of law. In the first place, the defendant puts his case in this way: "John Jenkins covenanted to purchase his beer, wines, and spirits from John Brothers. I am sued by a limited company, viz., the plaintiffs to whom I am not tied." That contention depends on the form and construction of the covenant in question. This covenant is in a separate deed contemporaneous with the second mortgage and intended to form part of it, and the two documents must be read together.

The covenant was to purchase beer, wines, and spirits from John Brothers without the addition of the words "their successors and assigns." Now, the cases cited show that those words are important, and their insertion in any particular case is a strong indication of an intention to give the successors and assigns the benefit of the covenant. But the words are not essential, as that intention may be gathered from other indications. The absence of those words in the present case is unimportant, the draftsman having shown a clear intention that the benefit of the covenant should go to the persons for the time being carrying on the business of John Brothers at Aber-

[1] The statement of the case is abridged and the arguments of counsel as well as a portion of the judgment, in which the court decided that the defendant must be regarded as a lessee of Jenkins the mortgagor rather than of John Thomas, the assignee of the first mortgage, are omitted — Ed.

garw. In the deed of covenant the partners are made parties of the second part, and described as "Morgan John and William John, trading in copartnership as John Brothers: at Abergarw, near Bridgend, Glamorgan, brewers, and wine and spirit merchants, hereinafter styled as John Brothers." If the forms of conveyancing had enabled the draftsman to do so, he would have made the firm a party and said, "which firm now consists of Morgan John and William John." No such form, however, could have been adopted, and therefore the draftsman made the partners parties and referred to them by their firm name of John Brothers in the subsequent parts of the deed. The firm name is used throughout both deeds. The money was advanced by the firm out of moneys belonging to them on their joint partnership account, and the Tondû Arms was tied to their business. The covenant must be regarded as having been made for the benefit of the business. Conveyancing forms do not admit of a covenant being entered into with a business, but this is what the draftsman has attained in another way. On the next day after the execution of the deed of covenant a new partner might have joined the firm, and, if the defendant's argument is sound, there would have been an end of the covenant, as the new firm being a different firm would not have been entitled to the benefit, and Morgan John and William John could not have enforced it for their own benefit, because they were no longer trading by themselves as John Brothers. I lay no stress on the fact that the firm has merely been converted into a company. That is quite as much an assignment of the business as if it had been assigned to strangers. But I hold that the persons entitled to the business are entitled to the benefit of the covenant, and on the first point I am against the defendant.

In the second place, the defendant contends that he is not an assign of John Jenkins. The equity of redemption in the Tondû Arms became vested in Evan Thomas, and the defendant is not his assign, but his underlessee. But is he not a person intended to be bound by the covenant? The covenant binds John Jenkins, his executors, administrators, and assigns "so long as he or they shall remain, continue, and be in the possession and occupation of the Tondû Arms, and the same shall not be sold or disposed of under any of the powers in the mortgages thereof, and thereby John Jenkins, his executors, administrators, or assigns, be forced to relinquish possession thereof." Why is the defendant not one of the persons intended to be bound by the covenant? If that was the intention, the defendant clearly can be bound as claiming under John Jenkins with notice, and it is not contended that the mere fact that he is an underlessee will assist him if the doctrine of Tulk *v.* Moxhay is applicable. Hall *v.* Ewin[1] is conclusive on that point. (The only question is whether the defendant was intended to be bound.) In my opinion, every one claiming under John Jenkins was intended to be bound. Bryant *v.* Hancock & Co.[2] is not much in point, but it shows that the word "assign" does not

[1] 37 Ch. D. 74.

[2] [1898] 1 Q. B. 716; [1899] A. C. 442.

necessarily exclude an underlessee. Whether it does so or not is a question of intention in each case. In the present case I think the covenant was intended to bind the premises in the hands of any one claiming through John Jenkins.[1]

L. A. LEWIS, Appellant, v. E. G. GOLLNER and Another, Respondents.

Court of Appeals, New York, December 1, 1891.

[129 *New York Reports*, 227.]

Finch, J.[2] All the facts alleged in plaintiff's complaint were found by the court, but were held to be insufficient to entitle him to equitable relief.

The plaintiff's residence was on President street between Seventh and Eighth avenues in the city of Brooklyn. That street and Union street, which runs parallel with it one block away, are occupied by private residences constructed by citizens of some wealth and social standing whose homes are more or less creditable to their taste, and in which, as giving character to their neighborhood, they feel a pardonable pride. That part of the city had never been invaded by flats or tenement-houses, which bring together a changing and floating population under one roof, having no ownership of their own, and caring little for anything beyond their personal comfort and immediate needs. Into this locality came the defendant Gollner, a builder of tenement-houses and flats. He bought a lot fronting on Union street and immediately in the rear of plaintiff's premises, and at once announced his intention of erecting there a seven-story flat. Such a building in such a locality was regarded as offensive and injurious by the residents of the vicinity, and the court has found as a fact that its construction in that locality would cause injury and damage to the neighboring premises. Gollner was not without experience, and apparently knew what he was about when he took some pains to let his plans be generally understood. The neighbors at first remonstrated, but found Gollner immovable and standing upon his

[1] Injunctions were issued against underlessees for the specific performance of restrictive agreements in Parker *v.* Whyte, 1 H. & M. 167; Wilkinson *v.* Rogers, 12 W. R. 119, 284 (*semble*); Clements *v.* Welles, L. R. 1 Eq. 200; Wilson *v.* Hart, 1 Ch. Ap. 463; Fielden *v.* Slater, 7 Eq. 522; Carter *v.* Williams, 9 Eq. 678; Patman *v.* Harland, 17 Ch. D. 353; Thornewell *v.* Johnson, 50 L. J. Ch. 640; Evans *v.* Davis, 10 Ch. D. 747; Hall *v.* Ewin, 37 Ch. D. 74; Mander *v.* Falcke, 1891, 2 Ch. 554; Bray *v.* Fogarty, Ir. R. 4 Eq. 544; Maunsell *v.* Hort, L. R. Ir. 1 Ch. D. 88 (affirming S. C. Ir. R. 11 Eq. 478); Godfrey *v.* Black, 39 Kan. 193; Sutton *v.* Head, 86 Ky. 156; Parker *v.* Nightingale, 6 All. 341; Howland *v.* Miller, 141 N. Y. 93; Seymour *v.* McDonald, 4 Sandf. Ch. 502; Birdsall *v.* Tiemann, 12 How. Pr. 551; Stees *v.* Kranz, 32 Minn. 313; Stines *v.* Dorman, 25 Oh. St. 580.

A mere occupier, having notice of the negative contract, may be restrained from violating it. Mander *v.* Falcke, 1891, 2 Ch. 554. — Ed.

[2] Only the opinion of the court is given. — Ed.

rights. They then sought to buy him out for the sole and declared purpose of saving the neighborhood from flats. Gollner had no title, but simply a contract. The price he had agreed to pay was eighteen thousand dollars, which was the full and fair value of the property, and upon that he had paid only the sum of five hundred dollars. He began the negotiations with a very large price, but finally agreed to sell out for twenty-four thousand and five hundred dollars, or a net profit of six thousand dollars, and upon the further contract that "he would not construct or erect any flats in plaintiff's immediate neighhood or trouble him any more." It is evident, since the lots were worth in the market but eighteen thousand dollars, since the sole motive of the purchasers from Gollner was to prevent his meditated construction, and since his declaration of his purpose was the cause and occasion of the final purchase, that the six thousand dollars was the consideration for the restrictive agreement of Gollner, and was the price paid for his covenant not to build flats in the neighborhood or trouble its residents with similar injurious and disagreeable enterprises. Neither party at all misunderstood that this was the material point of the contract. It would have been the extreme of folly for the purchasers to pay six thousand dollars to prevent the erection of flats on the one lot alone, leaving Gollner free to repeat the enterprise in the immediate neighborhood, and inflict the very injury to escape which the tribute had been paid. Gollner himself, according to the plaintiff's proof, accurately understood and clearly stated the pith of the agreement when he said, that after making it, if he should build flats in the vicinity, he "should be considered a blackmailer;" and when other lots were suggested by the witness Moody, Gollner said, "What, go for more blood money after I had taken blood money out of those people; I would not do it." And yet he did attempt to do it. At the moment when his contract with plaintiff was closed and the down payment was made, he began negotiations for the purchase of a lot on Union street diagonally opposite his first purchase and, obtaining title, at once commenced the erection of a seven-story flat. When reminded of his agreement and remonstrated with he seems, according to one witness, to have regarded it as a good joke upon his vendees, and added that "he guessed he could fight them with their own money, that he had $6,000 of it in his clothes — patting his pocket, — and he would see that go as far as it would last in that direction." Then came a letter from plaintiff's attorney threatening an action, and a refusal by one of his materialmen to further supply him under the circumstances, and thereupon Gollner sought shelter for his enterprise and his breach of faith under an ownership in his wife. His equity in the lot purchased was $2,000, and that equity, together with his large expenditure upon the foundations, he conveyed to her for her equity in two other lots which amounted to seven hundred dollars; and then, as her agent and architect nominally and in form, continued the construction. Mrs. Gollner lent herself to this artifice and took the title with full knowledge of

all the facts, and unquestionably for the purpose and with the intent of aiding and protecting her husband in his effort to avoid his own honest obligation.

This state of facts had its natural effect upon the courts below, and the General Term, after their recital, added that if there was any authority, directly or indirectly, in plaintiff's favor they would without hesitation grant him relief; but saying that, felt also bound to say that equity stood helpless before this cool and deliberate wrong. The inquiry which faces us is, therefore, whether in truth equity is thus helpless to enforce such a clear and admitted right.

I think we should first examine the situation, as between plaintiff and Gollner, upon the supposition that the latter had remained owner of the land and was himself engaged in violating his contract, and ask of ourselves the question whether in such event it would have been possible for equity to interfere, or whether the objections and difficulties suggested by the respondents would have proved insuperable.

Two of those objections we may dismiss quite briefly. The agreement was not in the least indefinite or uncertain, as it respects the matter in controversy. The phrase "immediate neighborhood," taken in connection with the subject-matter of the contract, is not so indefinite as to be incapable of just and natural boundaries, but in any event, covers and includes the locality of the construction in progress. The court has so found, and there is no reason for doubting its correctness. Nor is there any foundation for saying that, in its restrictive character, the agreement is against public policy. We have too lately discussed that subject to make a recurrence to it necessary. We have perhaps widened and extended the area within which restraints of trade and business may lawfully operate, and certainly should not narrow them till they are less than one neighborhood in a single city.

Nor is there any difficulty in the fact that the agreement is by parol and purely personal. If just grounds of equitable jurisdiction exist, any valid contract, however unsolemn, may be enforced by a decree of specific performance. The cases are very numerous in which agreements purely personal not to engage in a particular trade or business within certain reasonable boundaries have been enforced by injunction, and it certainly does not lessen the duty or imperil the right that the contract proved or established is by parol. In one possible view of this case, we are in fact dealing with just such a contract. The occupation of the defendant Gollner was that of a builder of flats and tenement-houses. He so describes himself and gives that as his specific business and occupation. He sought to carry it on in plaintiff's neighborhood, and was paid six thousand dollars not to carry it on in that locality, and because his doing so would in fact cause injury to the persons who paid him the money. Of course, there is a difference between the present case and those in which the contract purpose is to prevent competition; a difference which respects the nature and character of the injury resulting from a breach; but that difference does not disturb the doctrine common to both, that

in a proper case, equity will specifically enforce by affirmative decree or restraining injunction a definite and fully-established and valid contract, although a personal one, and irrespective of the fact that it happened to be by parol. The jurisdiction attaches upon the ground that an action at law for damages will not do complete justice, or accomplish the purpose contemplated by the contract. Even though the agreement itself fixes a penalty for its breach, it will not follow that equitable relief must be denied, for, if the contract appears to be such in its character and purpose that its performance was contemplated by the parties and not merely damages for the breach, the equitable relief will be awarded. Diamond Match Co. *v.* Roeber. When that relief is by injunction to restrain the commission of an injurious act, the complaint of the plaintiff is somewhat in the nature of a bill *quia timet*, in which equity acts to prevent a mischief rather than to redress it. There is, therefore, no reasonable doubt that if Gollner was still the owner of the land and engaged in constructing the flats his enterprise could be restrained by injunction. No other remedy would have the dimensions or proportions of the contract purpose. Money damages could not be an accurate substitute and would merely palliate and not redress the injury. It would be a continuing one whose full and actual effects could scarcely be foreseen, and which the plaintiff could only escape by breaking up his home and retreating to some possible locality in which tenements were not and their builders did not afflict.

But Gollner did not remain the owner of his new purchase, and that brings us to the difficulty which the courts below deemed insurmountable, and which needs to be thoughtfully considered. They reasoned that the new vendee could not be affected, except through or by the purchase of the land, and so, only when the land carried with it as an inseparable attachment the burden of the contract; that when the contract was made, there was no land to which it did or could attach; and the agreement remained wholly personal to Gollner and did not affect or bind his wife. I do not see the contract in that way. Gollner might have fulfilled it by omitting to buy or lease any land within the prescribed limits, but his agreement left him at liberty to do so or not as he pleased, and yet required that if he did so purchase or lease, he should not erect upon the land so owned or possessed the prohibited structures. The moment he bought or leased any such land, he came under an obligation not to use it in a particular way; the land in his hands necessarily became restricted and limited in the use of which it was capable; and as much so, though bought of another, as if it had come from the contractor, who imposed the restraint as vendor. I do not see why the equitable rights of the plaintiff did not attach to the land when bought, if it came, as it did, within the scope of the contract. Why should it affect the result that the obligation and the land ownership were not simultaneous, or that the latter came from a vendor who did not restrict when the contractor could and did? In the case of a mortgage the lien may attach to and bind after-acquired

property, or cover future and later advances, as between the parties themselves, and that is permitted because they have so agreed and their contract contemplates that precise result. In like manner I think the agreement under discussion was in substance and effect, that whatever land the defendant Gollner might thereafter possess in that immediate neighborhood should be restricted in its use by him, and should not be devoted to the construction of tenements or flats. In other words, when he bought the land the plaintiff's equitable rights at once attached to it, became a burden upon it so long as Gollner owned it, so that apparently the contract ceases to be merely and purely personal, because it affects and was intended to affect the use and occupation of Gollner's after-acquired land in that neighborhood. But if the contract remains technically a personal one, I think the reasonable and settled doctrine is that the contract equity is so attached to the use of the land which is the subject-matter as to follow the land itself into the hands of a purchaser with full knowledge of all the facts, who buys with his eyes open to the existing equity, and more especially when he buys for the express purpose of defeating and evading that equity. It has been held that the equity resulting from a valid agreement, although the latter was not a covenant running with the land, or a legal exception or reservation out of it, but stood solely upon the ground of a personal contract dictating the mode of user, would, nevertheless, go with the land into the hands of a purchaser, with notice, and who did not buy innocently or in good faith. Whitney *v.* Union Railway Co.[1]

In Hodge *v.* Sloan, we substantially affirmed that doctrine, holding that a purchaser without restriction in his deed, but from one who was restricted by a personal covenant, not running with the land or binding his assigns, yet with notice of the facts, is bound by the restriction in a court of equity. Judge DANFORTH described the character of the agreement thus: "It is restrictive, not collateral to the land, but relates to its use."

It is true and should be noted that in these cases the restrictions followed the line of title and were imposed by the original owners and vendors of the land, while here they were not so imposed, but came from one never an owner of the land, but deriving his right from a contract with one who did become such owner. But why should that difference change the result? The original owner's right rests upon one consideration, and that of the stranger to title upon another, but each are equally good and worthy of equitable regard. In Parker *v.* Nightingale,[2] it is declared not to be in the least material that the restrictive stipulations should be binding at law, or that any privity of estate should subsist between parties in order to render them obligatory and to warrant equitable relief in case of their infraction. I think that doctrine is sound and just. The source of the restriction would seem to be immaterial if itself binding and founded upon sufficient consideration; and a breach is no greater wrong to a privy in

[1] 11 Gray, 363. [2] 6 Allen, 344.

estate than to a stranger validly contracting about its use. Nor can the vendee in bad faith stand upon such a difference. Equity has no compassion for a fraud, and he who buys in aid of one with full knowledge of what is right, but with purpose to defeat it, should not escape the hand of equity by a criticism upon the origin of the restriction violated. If these views are correct it will follow that plaintiff should have been awarded the relief which he sought.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur, except RUGER, Ch. J., and ANDREWS, J., not voting.

Judgment reversed.

MURPHY AND OTHERS, RESPONDENTS, *v.* CHRISTIAN PRESS ASSOCIATION PUBLISHING CO. APPELLANT.

APPELLATE DIVISION OF SUPREME COURT, NEW YORK, MARCH TERM, 1899.

[38 *New York Appellate Division*, 426.]

CULLEN, J.[1] This action was brought by the plaintiffs, who constitute the firm of John Murphy & Co., to restrain the defendant from selling a prayer book published by it, and known as "A Manual of Prayers for the Use of the Catholic Laity," at lower prices than those prescribed in an agreement between the plaintiffs and the Catholic Publication Society Company. In 1889 that company owned the copyright of the book. This is charged in the complaint and admitted in the answer, and we can take no notice of the communication of counsel for the appellant, in which he asserts that the company did not acquire the copyright until a subsequent time. For the publication of the work the company had procured four sets of electrotype plates — one of these for printing the whole text in black, a second for printing the text partly in black and partly in red, and two others which were duplicates of those described. In June, 1889, the Catholic Company entered into a written agreement with the plaintiffs by which it sold them one set of plates (for printing in single color only), and authorized the plaintiffs, subject to certain restrictions, to publish the work from that set of plates. The Catholic Society covenanted that it would not sell a set of plates to any other publisher without the consent of the plaintiffs. The agreement contained this further provision: "It is further agreed that the retail price for plainly bound copies shall be one dollar and twenty-five cents, and a royalty of six cents for each and every copy sold shall be paid to the ordinary of the diocese in which the book is printed and published. It is further agreed that the greatest discount allowed to the trade shall not exceed

[1] A portion of the opinion in which the court discussed the meaning of "plainly bound copies," and decided that the agreement was not illegal as being in restraint of trade, is omitted. — ED.

forty per cent, and the greatest discount allowed to the clergy and religious shall not exceed twenty-five per cent, except when the trade purchases five hundred dollars' worth at any one time, then an extra ten per cent may be allowed, and except when the trade purchases one thousand dollars' worth at any one time; then fifty per cent discount may be allowed." The plaintiffs paid for the plates and both parties proceeded with the publication of the book. In 1895 the Catholic Society was dissolved and a receiver of its property appointed. The receiver sold the plates and copyright to the appellant. At the time of the purchase the appellant had full notice of the agreement with the plaintiffs, a copy of the agreement having been delivered to it. Since its purchase the appellant has published the prayer book and has sold it at a price much less than that prescribed by the agreement between the plaintiffs and the Catholic Society. The edition published by the appellant is in parti-colored print, commonly called "rubricated." The text presents a more beautiful appearance to the eye, and it is a rather finer book than that published by the plaintiffs. The Special Term enjoined the appellant from selling its publications at less than the stipulated price, and directed a reference to assess the plaintiffs' damages. From that judgment this appeal is taken.

We think this action can be maintained against the appellant, and that it is bound by the agreement of the Catholic Publication Society Company from which it acquired the copyright and electrotype plates. The agreement on the part of the defendant's predecessor in title, though technically a personal one, related to the use of its property, the copyrights and the plates, and obligated all who might acquire that property with notice of the agreement. This is the settled doctrine of the Court of Appeals where the agreement relates to real estate. Hodge *v.* Sloan; Lewis *v.* Gollner. We can see no reason why the same rule should not apply in the case of personal property, nor are we wanting in authority to sustain the proposition. New York Bank Note Co. *v.* Hamilton Bank Note Co.;[1] Littlefield *v.* Perry.[2] In Drone on Copyright (p. 374) it is said: "It may be regarded as settled that a Court of Chancery will restrain an author, or any person having notice, from violating an express negative covenant made by the author." This is equally applicable to the covenant of any person who has acquired title to the copyright in any manner. While the plaintiffs under their agreement with the Catholic Society acquired no legal title to any part of the copyright, in equity they acquired an interest very similar to a negative easement in real estate, which easement incumbered the property in the hands of any party who might have notice. A copyright is very much of the same character as a patent. Under a license a patentee acquires no title to the patent, but he may in the name of his licensor prosecute infringers on his rights, or compel the licensor to specifically perform the terms of his agreement.

All concurred.

Judgment affirmed, with costs.[3]

[1] 83 Hun, 593; 28 App. Div. 411. [2] 88 U. S. 205.

[3] New York Co. *v.* Hamilton Co., 83 Hun, 593; 28 N. Y. Ap. Div. 411 *Accord.* — Ed.

180 N.Y. 280 ; 1904 1 Ch. 354 ; 179 Mass. 588.

RENALS *v.* COWLISHAW.

IN THE CHANCERY DIVISION, BEFORE HALL, V. C., APRIL 10. 1876.

[*Law Reports, 9 Chancery Division*, 125.]

By an indenture dated the 29th of September, 1845, Messrs. Hoby, Winterbotham, and Russell, as the devisees in trust for sale of a mansion-house and residential property known as the Mill Hill estate, and of certain pieces of land adjoining thereto, sold and conveyed two of these adjoining pieces of land to one Francis Shaw, in fee, and Shaw thereby, for himself, his heirs, executors, and administrators, covenanted with Hoby, Winterbotham, and Russell, their heirs, executors, administrators, and assigns, not to build upon the lands thereby conveyed within a certain distance from a particular road leading "to the Mill Hill house and property belonging to the said trustees;" that the garden walls or palisades to be set up along the side of the said road should stand back a certain distance from the centre of the road; that any house to be built on the land adjoining the road should be of a certain value, and of an elevation at least equal to that of the houses on a particular road; and that no trade or business should be carried on in any of such houses or buildings, but that the same should be used as private dwelling-houses only. The conveyance did not state that this covenant was for the protection of the residential property, or in reference to the other adjoining pieces of land, or make any statement or reference thereto.

The same trustees also sold about this time other pieces of lands adjoining the Mill Hill estate; and the conveyance to the purchaser in each case contained restrictive covenants similar to those above mentioned. It was alleged by the plaintiffs in their statement of claim that the intention of all the restrictive covenants was to protect and maintain the value of the Mill Hill estate, and to secure the continuance of the surrounding neighborhood as purely residential in character.

The trustees, in December, 1854, sold and conveyed the Mill Hill estate to T. B. Bainbrigge in fee, and, Bainbrigge having died, his devisees in trust, in September, 1870, sold and conveyed the same estate to the plaintiffs as tenants in common in fee.

In neither of these two conveyances were there covenants similar to those in the conveyance to Shaw, but there was in the conveyance to the plaintiffs a covenant by them with their vendors not to build a public-house or carry on offensive trades upon a particular portion of the property conveyed to them. Neither of the two conveyances recited or mentioned in any way the conveyance or sale to Shaw, or the existence of any restrictive covenant entered into by Shaw or by Gadsby, nor did either of them recite or mention the sales or conveyances of the other pieces of land sold as above mentioned.

There had also been a devolution title with regard to the lands sold to Shaw; for after his death Mary Shaw, the person entitled under his will, in August, 1867, sold and conveyed part of the lands comprised in the indenture of September, 1845, to John Gadsby in fee, who, in his conveyance, entered into covenants with Mary Shaw, her heirs, executors, and administrators, substantially identical *mutatis mutandis* with the restrictive covenants contained in the indenture of the 29th of September, 1845. And subsequently the lands so conveyed to Gadsby were sold and conveyed (with certain buildings erected thereon) by Gadsby, or persons deriving title through him, to the defendants as tenants in common in fee.

The plaintiffs alleged that the defendants were carrying on upon their lands and in contravention of the restrictive covenants first above mentioned, the trade of wheelwrights, smiths, and bent timber manufacturers, and had erected a high chimney which emitted thick black smoke, and that those acts were destructive of the residential character of the neighborhood, and had deteriorated the value and amenity of the Mill Hill estate. By their action they claimed an injunction to restrain the defendants from carrying on any trade or business upon their lands, and from permitting the buildings erected thereon to be used otherwise than as private houses, and from contravening in any manner the restrictive covenants contained in the indenture of September, 1845.

The principal question argued, and that on which the decision turned, was as to the right of the plaintiffs to sue upon these covenants.

It appeared that no contract had been entered into or representations made, either upon the occasion of the purchase by Bainbrigge from the trustees, or upon the purchase from Bainbrigge by the plaintiffs, that the purchaser should have the benefit of the covenants entered into by Shaw with the trustees.

Dickinson, Q. C., and *Renshaw*, for the plaintiffs.[1]

W. Pearson, Q. C., and *Bury*, for the defendants, were not called upon.

HALL, V. C. I think this case is governed by Keates *v.* Lyon, by Child *v.* Douglas,[2] as ultimately decided by Vice-Chancellor Wood,[3] who, after granting an interlocutory injunction in the first instance, refused to grant the plaintiff an injunction at the hearing, and by the case of Master *v.* Hansard.[4]

The law as to the burden of and the persons entitled to the benefit of covenants in conveyances in fee, was certainly not in a satisfactory state; but it is now well settled that the burden of a covenant entered into by a grantee in fee for himself, his heirs and assigns, although not running with the land at law so as to give a legal remedy against the owner thereof for the time being, is binding upon the owner of it for the time being, in equity, having notice thereof. Who, then (other than the original covenantee), is entitled to the benefit of the covenant?

[1] The argument for the plaintiffs is omitted. — ED.
[2] Kay, 560; 5 D. M. & G. 739. [3] 2 Jur. N. S. 950. [4] 4 Ch. Div. 718.

From the cases of Mann *v.* Stephens,[1] Western *v.* Macdermott,[2] and Coles *v.* Sims,[3] it may, I think, be considered as determined that any one who has acquired land, being one of several lots laid out for sale as building plots, where the court is satisfied that it was the intention that each one of the several purchasers should be bound by and should, as against the others, have the benefit of the covenants entered into by each of the purchasers, is entitled to the benefit of the covenant; and that this right, that is, the benefit of the covenant, enures to the assign of the first purchaser, in other words, runs with the land of such purchaser. This right exists not only where the several parties execute a mutual deed of covenant, but wherever a mutual contract can be sufficiently established. A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendor by another or others where his vendor has contracted with him that he shall be the assign of it, that is, have the benefit of the covenant. And such covenant need not be express, but may be collected from the transaction of sale and purchase. In considering this, the expressed or otherwise apparent purpose or object of the covenant, in reference to its being intended to be annexed to other property, or to its being only obtained to enable the covenantee more advantageously to deal with his property, is important to be attended to. Whether the purchaser is the purchaser of all the land retained by his vendor when the covenant was entered into, is also important. If he is not, it may be important to take into consideration whether his vendor has sold off part of the land so retained, and if he has done so, whether or not he has so sold subject to a similar covenant: whether the purchaser claiming the benefit of the covenant has entered into a similar covenant may not be so important.

The plaintiffs in this case, in their statement of claim, rest their case upon their being "assigns" of the Mill Hill estate, and they say that as the vendors to Shaw were the owners of that estate when they sold to Shaw a parcel of land adjoining it, the restrictive covenants entered into by the purchaser of that parcel of land must be taken to have been entered into with them for the purpose of protecting the Mill Hill estate, which they retained; and, therefore, that the benefit of that restrictive covenant goes to the assign of that estate, irrespective of whether or not any representation that such a covenant had been entered into by a purchaser from the vendors was made to such assigns, and without any contract by the vendors that that purchaser should have the benefit of that covenant. The argument must, it would seem, go to this length, viz., that in such a case a purchaser becomes entitled to the covenant, even although he did not know of the existence of the covenant, and that although the purchaser is not (as the purchasers in the present case were not) purchaser of all the property retained by the vendor upon the occasion of the conveyance containing the covenants. It appears to me that the three cases to which I have referred show that this is not the law of this court;

[1] 15 Sim. 377. [2] Law Rep. 2 Ch. 72. [3] Kay, 56; 5 D. M. & G. 1.

and that in order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenants, and that conveyance not showing that the benefit of the covenant was intended to enure for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this, at least, must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase. Lord Justice Bramwell, in Master *v.* Hansard,[1] said: "I am satisfied that the restrictive covenant was not put in for the benefit of this particular property, but for the benefit of the lessors to enable them to make the most of the property which they retained." In the present case I think that the covenants were put in with a like object. If it had appeared in the conveyance to Bainbrigge that there were such restrictive covenants in conveyances already executed, and expressly or otherwise that Bainbrigge was to have the benefit of them, he and the plaintiffs, as claiming through him, would have been entitled to the benefit of them. But there being in the conveyance to Bainbrigge no reference to the existence of such covenants by recital of the conveyances containing them or otherwise, the plaintiffs cannot be treated as entitled to the benefit of them. This action must be dismissed with costs.[2]

H. M. PECK *v.* J. E. CONWAY AND ANOTHER.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH 9, 1871.

[119 *Massachusetts Reports*, 546.]

BILL in equity, by the owner of lot A, shown on the plan printed in the margin,[3] to restrain the defendants, the owners of lots B and C, from building on lot B.

The case was reserved by Colt, J., upon the pleadings and the report of a master, for the consideration of the full court, and was as follows:

1 4 Ch. D. 724.

2 Affirmed in 11 Ch. Div. 866, James, L. J., saying: "I do not think it necessary to add anything more, except that I entirely concur with every word of the judgment of Vice-Chancellor Hall," and Baggallay, L. J., giving this judgment: "I am of the same opinion with the Lord Justice, and I adopt entirely the language of the Vice-Chancellor in his judgment, as reported."

The following decisions accord with Renals *v.* Cowlishaw: Child *v.* Douglas, 2 Jur. N. S. 950, Kay, 565; Keates *v.* Lyon, 4 Ch. Ap. 218; Master *v.* Hansard, 4 Ch. Div. 718; Kemp *v.* Bird, 5 Ch. Div. 974; Badger *v.* Boardman, 16 Gray, 559; Jewell *v.* Lee, 14 All. 145; Sharp *v.* Ropes, 110 Mass. 381; Dana *v.* Wentworth, 111 Mass. 291; Lowell Institution *v.* Lowell, 153 Mass. 530; Clapp *v.* Wilder, 176 Mass. 332 (3 judges dissenting); Tibbetts *v.* Tibbetts, 66 N. H. 360; Equitable Society *v.* Brennan, 148 N. Y. 661 (reversing s. c. 74 Hun, 576). — ED.

3 See page 163.

Richard Ensign, on February 14, 1848, being the owner of lots A and B, and occupying lot A as a homestead, conveyed lot B, in fee simple, with general covenants of warranty, to Joseph B. Huggins, who was then the owner of lot C. The deed described the land by metes and bounds, and following the description was this clause: "with this express reservation, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed."

The defendants purchased lots B and C in 1874. Of the deeds in the chain of title from Huggins, which were all duly recorded before the defendants purchased, some mentioned or referred to the reservation in Ensign's deed, but the deed to the defendants, which contained full covenants of warranty, made no mention of it or reference to former deeds. The defendants made no examination of the records before their purchase, and had no actual knowledge of the reservation.

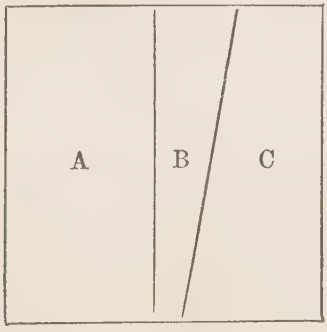
The plaintiff purchased lot A of Richard Ensign by deed dated April 13, and recorded April 14, 1848. This deed made no mention of privileges or appurtenances, or of the reservation in the deed to Huggins. The defendants purchased their land, paying therefor its full market value, free of incumbrances, for the purpose of building thereon. The plaintiff notified them of the restriction before they commenced building, and forbade them so to do, and, upon their proceeding to build upon the land, brought this bill.

The master found that the greater part of the proposed building would stand upon lot B; that it would not obstruct the view from the front rooms in the plaintiff's house, and only partially obstruct the view from the rooms in the rear part of the house; and that its erection would be no appreciable damage or injury to the plaintiff's premises.

A. J. Waterman, for the plaintiff.

J. Dewey, Jr., for the defendants.

MORTON, J. Both parties derive title from Richard Ensign. The deed of said Ensign, under which, through various mesne conveyances, the defendants derive their title, conveys to Joseph B. Huggins a



triangular piece of land adjoining the lot now owned by the plaintiff, "with this express reservation, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed." Ensign, being owner of the fee, had the right to sell his land subject to such reservations or restrictions as to its future use and enjoyment as he saw fit to impose, provided they were not contrary to public policy. The restriction in this deed, that no building should be erected upon the land conveyed, was one which he had a right to make, and there is no room for doubt, that, if a building was erected in violation of this restriction, Ensign, as long as he lived and remained the owner of the adjoining land, would be entitled to relief in equity to enforce the restriction. Parker *v.* Nightingale;[1] Whitney *v.* Union Railway;[2] Badger *v.* Boardman.[3]

The only question in the case is whether the plaintiff, who is the grantee of said Ensign, is entitled to the same remedy.

The reservation creates an easement, or servitude in the nature of an easement, upon the land conveyed. If this easement was created for the benefit of the adjoining lot, of which the grantor in the deed remained the owner, and not for the personal convenience of the grantor, and was intended to be annexed to such lot, it would be appurtenant thereto, and would pass to a grantee thereof.

The question whether such an easement is a personal right, or is to be construed to be appurtenant to some other estate, must be determined by the fair interpretation of the grant or reservation creating the easement, aided, if necessary, by the situation of the property and the surrounding circumstances.

In this case, the triangular piece of land affected by the easement was a part of a large lot owned by Ensign. He retained the remainder of the large lot for his homestead. There is no suggestion that he had other land in the vicinity, which could be benefited by the restriction. It is difficult to see how he would have any interest in restricting the use of the land sold, except as owner of the house lot which he retained. The nature of the restriction also implies that it was intended for the benefit of this lot. A prohibition against building on the land sold would be obviously useful and beneficial to this lot, giving it the benefit of better light and air and prospect; this is its apparent purpose, while it would be of no appreciable advantage for any other purpose. The fair inference is that the parties intended to create this easement or servitude for the benefit of the adjoining estate. We are therefore of opinion that it was not a mere personal right in Ensign, but was an easement appurtenant to the estate which he conveyed to the plaintiff. Dennis *v.* Wilson;[4] Stearns *v.* Mullen.[5] It follows that the plaintiff is entitled to the relief which she seeks.

The fact that the defendants, when they took their deed, had not actual knowledge of this reservation is immaterial. They derive their title under the deed which contains it, and have constructive notice

[1] 6 Allen, 341. [2] 11 Gray, 359. [3] 16 Gray, 559.
[4] 107 Mass. 591. [5] 4 Gray, 151.

of the provisions of the deed. Whitney *v.* Union Railway, *ubi supra.* Nor can the fact found by the master, that the erection of the building contemplated by the defendants "would be no appreciable damage or injury to the plaintiff's premises," affect the rights of the parties. Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived, because in the judgment of others it is of little or no damage.

Decree for the plaintiff.[1]

ROGERS *v.* HOSEGOOD.

Court of Appeal, July 5, 1900.

[*Law Reports*, 1900, 2 *Chancery*, 388.]

In 1869 George Plucknett, the plaintiff Rogers, Thomas Robinson, and W. M. Dunnage were carrying on in partnership, under the style of Cubitt & Co., the business of builders, and they were the owners in fee (subject to a mortgage thereof) of some land at Palace Gate, which they had laid out in plots suitable for the building of large private dwelling-houses.

By two deeds executed May 31, 1869, and July 31, 1869, two of the plots were sold and conveyed by the partners and their mortgagees to William, the then Duke of Bedford, in fee. By these deeds the Duke, with intent that the covenants thereinafter on his behalf contained might so far as possible bind the premises thereby conveyed and every part thereof, into whosesoever hands the same might come, and might enure to the benefit of the said G. Plucknett, W. R. Rogers, T. Robinson, and W. M. Dunnage, their heirs and assigns and others claiming under them, to all or any of their lands adjoining or near to the said premises, for himself, his heirs and assigns, covenanted with the four partners, their heirs and assigns, that no more than one messuage or dwelling-house, with such suitable outhouses and stabling (if any) as it might be thought fit to erect in connection therewith, should at any one time be erected or be standing on the Thorney House plot, and that such messuage should be adapted for and used as and for a

[1] Clegg *v.* Hands, 44 Ch. Div. 503; Robbins *v.* Webb, 68 Ala. 393, 77 Ala. 176; McMahon *v.* Williams, 79 Ala. 288; Frye *v.* Partridge, 82 Ill. 267; Schwoerer *v.* Boylston Association, 99 Mass. 285; Watrous *v.* Allen, 57 Mich. 362; Kirkpatrick *v.* Peshine, 24 N. J. Eq. 206; Gawtry *v.* Leland, 31 N. J. Eq. 385; Coudert *v.* Sayre, 46 N. J. Eq. 386; Hills *v.* Miller, 3 Paige, 254; Trustees *v.* Cowen, 4 Paige, 510; Gibert *v.* Peteler, 38 N. Y. 165 (covenant with a trustee of one lot of land enforced by the *cestui que trust*, who was owner at law of an adjoining piece of land; Trustees *v.* Lynch, 70 N. Y. 440; Lattimore *v.* Livermore, 72 N. Y. 174; Phœnix Co. *v.* Continental Co., 87 N. Y. 400; Post *v.* West, 115 N. Y. 361; Wetmore *v.* Bruce, 118 N. Y. 319; Howland *v.* Miller, 139 N. Y. 93; Clark *v.* Martin, 49 Pa. 289; Muzzarelli *v.* Hulshizer, 163 Pa. 643; Landell *v.* Hamilton, 175 Pa. 327; Electric Co. *v.* West Ridge Co., 187 Pa. 500 *Accord.* — Ed.

private residence only, and that no trade or business should at any time be carried on in or upon that plot. This covenant was entered into with the four partners only, and not with the mortgagees.

In the year 1872 Sir John Millais purchased from the four partners one of their plots at Palace Gate, separated from the Duke of Bedford's two plots by an intervening plot about 60 feet in width, and by a deed dated March 25, 1873 (which did not recite or refer to the above-mentioned covenants), the plot so purchased was conveyed to Sir J. Millais, together with "all the rights, easements, or appurtenances belonging or reputed to belong thereto," and he thereby entered into covenants not to build more than two messuages or dwelling-houses thereon, and not to carry on publicly upon the premises any trade or business, or to put up any sign upon the same indicating that any trade or business was carried on there. At the date of this conveyance Sir J. Millais had no knowledge of the covenants contained in the deeds of May 31 and July 31, 1869, and the conveyance to him contained no assignment of the benefit of those covenants, except such (if any) as might be implied by the use of the general words above quoted.

The partners conveyed a third plot of land (adjoining the plot secondly conveyed to him) to the Duke. In this conveyance there was no restrictive covenant by the Duke.

In the year 1872 William, Duke of Bedford, died, and Francis Charles Hastings, Duke of Bedford, became entitled as devisee under his will to the two plots of land comprised in the deeds of May 31 and July 31, 1869, and to the third plot.

Sir J. Millais died on August 13, 1896, and the plaintiffs William Henry Millais and George Gray were the surviving trustees of his will and devisees of his real estate, including his plot at Palace Gate.

The defendant had purchased the three Bedford plots from persons claiming through the devisee of William, Duke of Bedford, and at the time when he purchased those plots he had notice of the restrictive covenants to which two of those plots were subject. The defendant proposed to erect upon the three plots one large building, which was to be occupied as residential flats. Farwell, J., granted an injunction restraining the defendant from erecting any such building.[1]

July 5. Collins, L. J., read the judgment of the Court (Lord Alverstone, M. R., and Rigby and Collins, L. JJ.) as follows: This case raises questions of some difficulty, but we are of opinion that the decision of Farwell, J., is right and ought to be affirmed. No difficulty arises in this case as to the burden of the covenants. The defendant is the assignee of the covenantor in respect of the two plots of land comprised in the conveyances of May 31 and July 31, 1869, and he took with notice of the covenants now sought to be enforced. Nor have we any hesitation in accepting the conclusion of Farwell, J., that the buildings which the defendant proposes to erect will involve a

[1] The statement of facts is condensed. The judgment of Farwell, J., the arguments of counsel, and portions of the judgment of the Court of Appeal are omitted. — Ed.

breach of those covenants. The real and only difficulty arises on the question — whether the benefit of the covenants has passed to the assigns of Sir John Millais as owners of the plot purchased by him on March 25, 1873, there being no evidence that he knew of these covenants when he bought. Here, again, the difficulty is narrowed, because by express declaration on the face of the conveyances of 1869 the benefit of the two covenants in question was intended for all or any of the vendor's lands near to or adjoining the plot sold, and therefore for (among others) the plot of land acquired by Sir John Millais, and that they "touched and concerned" that land within the meaning of those words so as to run with the land at law we do not doubt. Therefore, but for a technical difficulty which was not raised before Farwell, J., we should agree with him that the benefit of the covenants in question was annexed to and passed to Sir John Millais by the conveyance of the land which he bought in 1873. A difficulty, however, in giving effect to this view arises from the fact that the covenants in question in the deeds of May and July, 1869, were made with the mortgagors only, and therefore in contemplation of law were made with strangers to the land: Webb *v.* Russell,[1] to which, therefore, the benefit did not become annexed. That a court of equity, however, would not regard such an objection as defeating the intention of the parties to the covenant is clear; and, therefore, when the covenant was clearly made for the benefit of certain land with a person who in the contemplation of such a court was the true owner of it, it would be regarded as annexed to and running with that land, just as it would have been at law but for the technical difficulty. We think this is the plain result of the observations of Hall, V. C., in the well-known passage in Renals *v.* Cowlishaw, of Jessel, M. R., in London and South Western Ry. Co. *v.* Gomm,[2] and of Wood, V. C., in Child *v.* Douglas,[3] which, we agree with Farwell, J., are untouched on this point by anything decided in the subsequent proceedings in that case. Referring to Tulk *v.* Moxhay, Jessel, M. R., in London and South Western Ry. Co. *v.* Gomm, said: "The doctrine of that case, rightly considered, appears to me to be either an extension in equity of the doctrine of Spencer's Case [4] to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. . . . Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land" (by which he clearly means the burden), "and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he ac-

[1] 3 T. R. 393; 1 R. R. 725. [2] 20 Ch. D. 583. [3] Kay, 560. [4] 5 Rep. 16 a.

quired the legal estate for value without notice he was freed from the burden. (That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not.) In an earlier passage,[1] dealing with the covenant in question in that case, namely, a covenant by a purchaser and his assigns to re-sell, if called upon by the vendor (a railway company), and with the objection that it contravened the rule against perpetuities, the learned judge said: "Whether the rule applies or not depends upon this as it appears to me, does or does not the covenant give an interest in the land? If it is a bare or mere personal contract it is of course not obnoxious to the rule, but in that case it is impossible to see how the present appellant can be bound. He did not enter into the contract, but is only a purchaser from Powell who did. If it is a mere personal contract it cannot be enforced against the assignee. Therefore the company must admit that it somehow binds the land. But if it binds the land it creates an equitable interest in the land." These observations, which are just as applicable to the benefit reserved as to the burden imposed, show that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land. The benefit may be annexed to one plot and the burden to another, and when this has been once clearly done the benefit and the burden pass to the respective assignees, subject, in the case of the burden, to proof that the legal estate, if acquired, has been acquired with notice of the covenant. The passage inclosed in a parenthesis in the report of the judgment of Hall, V. C., in Renals *v.* Cowlishaw, supports the same view, nor are the general observations or the decision of the case itself inconsistent with it. There, in the original conveyance which imposed the restrictive covenant, there was no expression, as there is in the present case, that the restriction was intended for the benefit of any part of the estate retained. So in Child *v.* Douglas,[2] Wood, V. C., said: "Where part of the remaining property of the original vendor has been sold to another person, who must be considered to have bought the benefit of the former purchaser's covenant, and, more especially, when the subsequent purchaser has entered into a similar covenant on his own part, he must be considered to have done this in consideration of those benefits, and even whether he actually knew or was ignorant that this covenant was in fact inserted in the other purchase deeds, because he must be taken to have bought all the rights connected with his portion of the land." These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or

[1] 20 Ch. D. 580. [2] Kay, 571.

representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal, and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion. When, as in Renals *v.* Cowlishaw, there is no indication in the original conveyance, or in the circumstances attending it, that the burden of the restrictive covenant is imposed for the benefit of the land reserved, or any particular part of it, then it becomes necessary to examine the circumstances under which any part of the land reserved is sold, in order to see whether a benefit, not originally annexed to it, has become annexed to it on the sale, so that the purchaser is deemed to have bought it with the land, and this can hardly be the case when the purchaser did not know of the existence of the restrictive covenant. But when, as here, it has been once annexed to the land reserved, then it is not necessary to spell an intention out of surrounding facts, such as the existence of a building scheme, statements at auctions, and such like circumstances, and the presumption must be that it passes on a sale of that land, unless there is something to rebut it, and the purchaser's ignorance of the existence of the covenant does not defeat the presumption. We can find nothing in the conveyance to Sir John Millais in any degree inconsistent with the intention to pass to him the benefit already annexed to the land sold to him. We are of opinion, therefore, that Sir John Millais's assigns are entitled to enforce the restrictive covenant against the defendant, and that his appeal must be dismissed.

NOTTINGHAM PATENT BRICK AND TILE CO. *v.* BUTLER.

COURT OF APPEAL, MARCH 5, 1886.

[*Law Reports*, 16 *Queen's Bench Division*, 778.]

APPEAL of the defendant from the judgment of Wills, J., at the trial of the action in favor of the plaintiffs.[1]

The action was brought to recover the sum of 610*l.*, which the plaintiffs had paid to the defendant as a deposit upon the purchase by the plaintiffs from the defendant of a plot of land containing about six and a half acres. At the time of the bargain the plaintiffs were not aware that the land was subject to any covenants or conditions restricting the mode of its user by the owner.[2]

1 15 Q. B. D. 261.

2 The statement of the case is abridged, and the arguments for the plaintiffs, as well as

In December, 1882, the plaintiffs discovered for the first time that the land had formed part of an estate of about forty-three acres, which was on the 24th of March, 1865, put up by the then owners in fee for sale by auction in thirteen lots, the plot which the present plaintiffs had agreed to purchase from the defendant having been lot 11 at that sale. That sale was made subject to (*inter alia*) the following conditions: —

"15. All buildings to be erected on any part of the said lands shall be stone-colored, with slated roofs; and no building to be occupied as a public house or workshop, or blacksmith's shop, or as a butcher's shop or slaughter-house, or chandler's house or shop, or as a shop for the sale of any article whatsoever, or for the purpose of using, working, or making any article of manufacture therein, shall be erected, or built, or so used upon any part of the land now offered for sale; nor shall any part thereof be used as a brickyard, or for the making of bricks, except lot 13; and, in case the property shall be sold in lots, no house shall be erected on any part of the said land, except on lot 13, at a less cost than 400*l*."

"16. The purchaser of the property, or of each lot, in case the same shall be sold in lots, shall enter into all such covenants with the vendors as the vendors' counsel shall deem necessary or proper for securing the performance of these conditions on the part of such purchaser, which covenants shall be inserted in his deed of conveyance; and he shall also, in conjunction with the other purchasers (if any), enter into and execute a separate deed containing like covenants with the vendors, such separate deed being prepared at the expense of the vendors, but perused on behalf of such purchaser or purchasers respectively, and executed at his or their expense."

At this sale only lots 1, 2, and 12 were sold. In February, 1866, there was a second auction, at which lots 6, 7, and 8 were sold. In October, 1867, there was a third auction, at which lots 9 and 10 were sold. Lots 3, 4, and 5 were sold respectively in 1865, 1866, and 1867, by private contract to different purchasers. Lot 11 was also sold by private contract and was conveyed to Barnett, the purchaser, by a deed dated the 4th of September, 1866, which contained a restrictive covenant by the purchaser with the vendors in accordance with the above conditions of sale. Lot 13, which was then a brickfield, was sold in June, 1866, by private contract, and the conveyance of it to the purchaser contained, with the exception of a permission to build a blacksmith's shop, a covenant embodying such of the restrictions as were applicable to that lot. On the evidence, the Court was satisfied that all the lots were sold subject to the original conditions of sale, and that each of the purchasers entered into restrictive covenants with the vendors in accordance with those conditions, the covenants being modified in the case of lot 13, as above stated.

The defendant purchased lot 11 in 1877 from William Windley.

the concurring judgments of Lindley and Lopes, L. JJ., and a portion of the judgment of Lord Esher are omitted. — Ed.

The conveyance to Windley contained no reference to the restrictive covenants. The defendant alleged (though this defence was not much insisted on before Wills, J., at the trial) that he bought the property without any notice of the restrictive covenants, and that he discovered their existence afterwards on looking at the conveyance to Barnett.

The plaintiffs, on discovering the restrictive covenants, brought this action, claiming the return of their deposit. The defendant delivered a counter-claim for the specific performance of the agreement to purchase.

Wills, J., gave judgment for the plaintiffs on the claim and the counter-claim. The defendant appealed.

A. Charles, *Q. C.*, and *W. Graham*, for the defendant.

Cookson, *Q. C.*, *Darling*, *Q. C.*, and *R. M. Bray*, for the plaintiffs, were not heard.

Lord ESHER, M. R. I am of opinion that the decision of Wills, J., must be affirmed.

One fact in the case was not clearly brought before Wills, J., but, assuming the facts to be as he considered that they were, I think his judgment was right in every particular. The first point he had to consider was, whether there were with regard to this property restrictive covenants which could be enforced by any one of the purchasers of other parts of the estate of which this property had formed part against any other. It has been argued that there are no restrictive covenants capable of being enforced in that way, because there was no covenant, either in writing or otherwise in express terms, that each covenantor — each original purchaser — would consider himself bound to the other purchasers, and there was no covenant by the original vendor. But I think that Wills, J.'s, view of the law on this subject is perfectly correct. In my view he is right in saying that, when an estate is put up for sale in lots, subject to a condition that restrictive covenants are to be entered into by each of the purchasers with the vendor, and the vendor is intending at that sale to sell the whole of the property, the question, whether it is intended that each of the purchasers shall be liable in respect to those restrictive covenants to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention. And, if it is found that it was the intention that the purchasers should be bound by the covenants *inter se*, a Court of Equity will, in favor of any one of the purchasers, insist upon the performance of the covenants by any other of them, and will do so under such circumstances without introducing the vendor into the matter.

Now in the present case the property was originally put up for sale in lots, and it seems to me that the evidence is conclusive that the vendor, at the time when he first put it up to be sold by auction in lots, intended to sell the whole property, and that his intention to

sell the whole was clearly published, so that every one who was present at that auction must have known that he was intending to sell the whole, and, as the purchasers were to enter into restrictive covenants, it follows that the purchasers must have known that those covenants were really intended for the benefit of each of them as against all the rest. But it is said that the whole of the property was not sold at once; some parts of it were sold at the first auction, and other parts were not sold till afterwards. That is true, and it is also true that the subsequent sales were at considerable distances of time after the first. That would be a circumstance to be taken into account in considering what was the view of the later purchasers, if that was material. But it is impossible, in my opinion, to say that the mere fact that the lots were not all sold on one day can make any difference. Lapse of time is not of itself a bar to the liability of the purchasers *inter se;* it is a matter to be taken into consideration, but it is not a bar. In the present case I think the evidence is conclusive that the sale of every one of the lots was made under the original conditions, and under the authority which was given on the first occasion, when the vendor put up the whole of the lots for sale. The lots were not all sold on the first occasion only because there were not bidders for them all, but no new instructions were given to the auctioneer for the subsequent sales, no new bargain was made with him, no charges were made by him for altering any of the conditions.

There are two lines of cases to be found in the books. The first is where there has been a sale of part of a property, with no then existing intention of selling the rest, and subsequently there is a sale of another part; then, as regards the later sale, you cannot look at the conditions of the former sale, you must look only at the conditions relating to the later sale. The other line of cases is where the whole of a property is put up for sale (not necessarily under a building scheme), but is put up for sale in lots, subject to certain restrictive covenants; then it is a question of fact whether it was or was not the intention that the restrictive covenants should be entered into for the benefit of each of the purchasers as against all the others, and it is a most material circumstance whether the vendor reserves any part of the property for himself. If he does not reserve any part, that is almost if not quite conclusive (unless there is something contradictory) that the covenants which he takes from the purchasers are intended for the benefit of each purchaser as against the others.

Then it is said that there is no one who could enforce these covenants. But, if all these sales were parts of the one original sale, and the covenants were entered into by each purchaser for the benefit of the other purchasers, each of them could insist on the performance of the covenants by the others.[1]

[1] If land is sold in lots, whether by auction or by private sale, and whether at one time or at different times, with similar restrictive covenants in the deed to each purchaser, the covenants are treated as intended for the benefit of all the purchasers, and any one pur-

But the case comes before us on another point of view. It is said, and I will now assume that the fact is so, that Butler was a purchaser for value without notice of the restrictions, and then it is said that, if the plaintiffs took a conveyance from him, they would not be subject to the restrictions. As at present advised I think that would be so, and that, when once there has been a purchaser for value without notice of the restrictions, the restrictions are gone, and a good title can afterwards be made free from them.[1] But the title would then depend upon the question whether the previous purchaser did buy without notice; that must always be a question of fact and a matter of evidence, and a title depending upon evidence of matters of fact is a title which is capable of being disputed in a Court of Law, and, although the plaintiffs would in point of law, if the alleged fact was true, get the property free from the restrictions, yet in all probability, or almost certainty, they would be buying a lawsuit in order to get their title clear. Under such circumstances, where the rectitude of the title depends upon facts which very probably will be disputed, and are certainly capable of being disputed, a Court of Equity will not, as I understand, enforce the contract. Therefore, in that view also, the defendant would not be entitled to specific performance of the contract. But still, if there were nothing else in the case, I think he could not have been compelled to give back the deposit.

Appeal dismissed.

BARROW *v.* RICHARD AND OTHERS.

IN CHANCERY, NEW YORK, BEFORE R. H. WALWORTH, C., MAY 5, 1840.

[8 *Paige*, 351.]

THIS was an appeal from a decision of the vice chancellor of the first circuit, overruling the demurrer of the defendants to the complainant's bill. In 1825, T. R. Mercein was the owner of a block of ground in the city of New York, between McDougal Street and the Sixth avenue, on the south side of Waverley Place; which he divided

chaser or his assignee may proceed by injunction against any other purchaser or person claiming under him, if not a purchaser for value without notice of the restriction. Whatman *v.* Gibson, 9 Sim. 196; Eastwood *v.* Lever, 4 D. J. & S. 114; Western *v.* McDermott, 2 Ch. Ap. 72, L. R. 1 Eq 499; Harrison *v.* Good, 11 Eq. 338; Thornewell *v.* Johnson, 50 L. J. Ch. 640; Gookin *v.* Balls, 13 Ch. Div. 324; Nicoll *v.* Fenning, 19 Ch. Div. 258; Sayers *v.* Collyer, 28 Ch. Div. 103, 24 Ch. Div. 180 (*semble*); Collins *v.* Castle, 36 Ch. Div. 243; Tod-Heatley *v.* Benham, 40 Ch. Div. 80; Spicer *v.* Martin, 14 App. Cas. 12 (affirming s. c. 34 Ch. Div. 1); Mackenzie *v.* Childers, 43 Ch. Div. 265; *In re* Brighton Co., 1893, 1 Ch. 342; Davis *v.* Corp. of Leicester, 1894, 2 Ch 208 (*semble*); Knight *v.* Simmonds, 1896, 2 Ch. 299, 1896, 1 Ch. 653; Holford *v.* Acton Council, 1898, 2 Ch. 240 (*semble*). — ED.

[1] It was decided in Carter *v.* Williams, 9 Eq. 678, that a purchaser for value without notice, express or constructive, of a restrictive agreement acquired the property free from the restriction. See to the same effect: Allen *v.* Seckham, 11 Ch. Div. 790; Thornewell *v.* Johnson, 50 L. J. Ch. 641, 642 (*semble*); London Co. *v.* Gomm, 20 Ch. Div. 562, 583 (*semble*).

1903, 2 Ch. 212;
Am. cases are rare because of registration.
117 Mass 376; 65 N. Y. Sup. D. 124.

into thirty-nine building lots, and made a map of such division, and filed it in the office of the register of deeds. On the 22d of March, 1825, Mercein sold and conveyed five of the lots to four different persons in severalty. In each of the conveyances a condition was inserted, that the conveyance should be void if there should at any time be erected, made, carried on, permitted or suffered, upon any part of the premises so conveyed, any livery stable, slaughter house, tallow chandlery, smith's forge, furnace, brass or other foundry, nail or other iron factory, or any manufactory for the making of glue, varnish, vitriol, ink or turpentine, or for dressing or keeping skins or hides, or any distillery or brewery, or any other manufactory, trade or business whatsoever which should or might be *in anywise offensive to the neighboring inhabitants.* And Mercein subsequently sold more than twenty other lots in the same block, to different persons; and among them lot No. 11, subsequently purchased by the complainant, and lots No. 12 and 13, on which the defendants afterwards established their coal yard. In the conveyances of all of these lots, a similar provision was inserted, against the use of the lots for any noxious business, or any trade or business which might be offensive to the neighboring inhabitants; except that in these subsequent conveyances, the provision was in the shape of a mutual covenant between the grantor and grantee, instead of being in the form of a condition, as in the deeds for the first five lots.

The complainant had erected a valuable dwelling-house, of the first class, upon his lot No. 11. And the defendants had established a coal yard on the adjoining lots, 12 and 13, which the complainant insisted was offensive to the neighboring inhabitants and was a violation of the covenants contained in the deeds of those lots from Mercein. The object of the bill, therefore, was to compel the defendants to remove their coal yard, and for a perpetual injunction against the use of the lots for any noxious or offensive purpose, contrary to those covenants.[1]

The Chancellor. From the averments in the complainant's bill in this case, which, upon the demurrer, must be taken as true, there can be no doubt that the object of Mercein in having this restriction inserted in his conveyances to Richard and others was to enhance the value of the lots to all the purchasers in the block, and was intended to be enforced for their benefit. In this respect the case is different from that of the Duke of Bedford relative to the buildings erecting in the British Museum gardens, cited in the opinion of the vice chancellor, from the 9th London edition of Sugden on Vendors. I have not access to that edition of Sugden at present, and therefore only recollect the case as read by the counsel, upon the argument; and from the statement of it in the opinion of the vice chancellor. At the time that case came before the court of chancery in England, the splendid mansion called "Southampton House," once the residence of Rachel de Rou-

[1] The opinion of McCoun, V. C., the arguments of counsel, and a portion of the opinion of the Chancellor are omitted. — Ed.

vigny, Countess of Southampton, "*La belle et vertueuse Huguenotte*," and afterwards of her son-in-law, the amiable and talented Lord William Russell, who was beheaded in 1683, for his alleged participation in the Rye House plot, was no longer in existence; but his descendant, the Duke of Bedford, had caused a number of other houses to be erected upon the lot upon which it formerly stood. A question therefore naturally arose, whether a covenant with Lady Russell, who was temporarily the equitable owner of Southampton House, was intended for the benefit of the subsequent owners of the land on which that mansion stood at the time the covenant was entered into. And, if I recollect right, the court offered to the Duke as issue, to ascertain whether the covenant not to build upon the lands to the northward of Southampton House, was intended as an easement to the lands upon which the new buildings of the Duke were subsequently erected or not.

In the present case, I think, no one can doubt that the object of the covenants in the deeds from Mercein was to secure all the purchasers of lots in the block against an offensive use of any other of those lots. And if lots No. 12 and 13 had been conveyed to the defendants, or to those under whom they claim, while Mercein was still the owner of lot No. 11, I am not sure that any technical difficulty would have arisen in the maintaining an action at law, upon the covenants of the grantees of the two first mentioned lots, by the complainant, as the subsequent purchaser of lot No. 11, and the assignee of the covenant for an easement for the benefit of that lot. But as No. 11 was first conveyed, and the mutual covenants in the deed refer to that lot only, and not to other lots which still remained in the hands of Mercein, the subsequent purchasers from him of lots No. 12 and 13 would have taken their lots entirely discharged of the easement in favor of No. 11, had it not been for their covenants in their own deeds for the benefit of the "neighboring inhabitants;" that is, the owners of other lots in the block. Although the complainant could not maintain a suit at law on that covenant, in his own name, and would, perhaps, be only entitled to nominal damages if the suit was brought in the name of Mercein, this court can give full effect to the covenant, by a suit in the name of the party for whose benefit and protection the covenant was intended. See Bleecker *v.* Bingham.[1]

The vice chancellor was therefore right in overruling the demurrer. And the order appealed from is affirmed with costs.[2]

1 3 Paige's Rep. 246.

2 Hopkins *v.* Smith, 162 Mass. 444; Brouwer *v.* Jones, 23 Barb. 153, in which cases the lot of the plaintiff was conveyed by the original grantor before his conveyance of the defendant's lot, *Accord.* — ED.

HAYWOOD *v.* THE BRUNSWICK PERMANENT BENEFIT BUILDING SOCIETY.

COURT OF APPEAL, DECEMBER 3, 1881.

[8 *Queen's Bench Division*, 403.]

APPEAL from the judgment of Stephen, J., on further consideration.

This was an action against a building society, the mortgagees of certain land, upon a covenant to build and keep in repair houses erected upon the land. The facts were these: —

By an indenture dated the 17th of May, 1866, made between Charles Jackson and Edward Jackson, Charles Jackson granted a plot of land to Edward to the use that Edward should pay Charles an annual chief rent of £11, and Edward for himself, his heirs, executors, administrators, and assigns, covenanted with Charles, his executors and assigns, that he, Edward, his heirs and assigns, would pay Charles, his heirs and assigns, this rent half-yearly, and would erect and keep in good repair and, when necessary, rebuild, messuages on the land of the value of double the rent. On the 2d of March, 1867, Charles Jackson conveyed to Haywood, to the use of Haywood, his heirs and assigns, the said chief rent and all powers and remedies in respect thereof, together with the benefit of the said covenant. Edward Jackson assigned his interest to MacAndrew. MacAndrew by a deed of the 8th of September, 1871, mortgaged the premises in question to certain persons described as the trustees of the Brunswick Building Society in fee subject to the rent-charge and covenants above-mentioned. The building society was afterwards incorporated under the Act of 1874, and under the mortgage deed took possession of the land and the buildings on it. It was conceded on the one hand that buildings of the stipulated value had been erected upon the land, and on the other that they had not been kept in repair, and the question was whether, under the circumstances stated, the building society was liable upon the covenant to keep them in repair. No question arose as to their liability to pay the chief rent, as the arrears were paid into court in the action.

The case was tried before Stephen, J., without a jury, at the Manchester Winter Assizes, 1881, who, after reserving it for future consideration, gave judgment for the plaintiff.

The defendants appealed.[1]

Dec. 3. BRETT, L. J. This appeal must be allowed. I am clearly of opinion, both on principle and on the authority of Milnes *v.* Branch,[2] that this action could not be maintained at common law.

[1] The judgment of Stephen, J., the arguments of counsel, and the concurring judgments of Cotton and Lindley, L. JJ., are omitted. — ED.

[2] 5 M. & S. 411.

Milnes *v.* Branch must be understood, as it always has been understood, and as Lord St. Leonards[1] understood it, and it will be seen, on a reference to his book, that he considers the effect of it to be that a covenant to build does not run with the rent in the hands of an assignee.

This being so, the question is reduced to an equitable one. Now the equitable doctrine was brought to a focus in Tulk *v.* Moxhay, which is the leading case on this subject. It seems to me that that case decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced. It may be also, but it is not necessary to decide here, that all covenants also which impose such a burden on the land as can be enforced against the land would be enforced. Be that as it may, a covenant to repair is not restrictive and could not be enforced against the land; therefore such a covenant is within neither rule. It is admitted that there has been no case in which any court has gone farther than this, and yet if the court would have been prepared to go farther, such a case would have arisen. The strongest argument to the contrary is, that the reason for no court having gone farther is that a mandatory injunction was not in former times grantable, whereas it is now; but I cannot help thinking, in spite of this, that if we enlarged the rule as it is contended, we should be making a new equity, which we cannot do.

I think also that Cox *v.* Bishop[2] shows that a court of equity has refused to extend the rule of Tulk *v.* Moxhay in the direction contended for, and that if we decided for the plaintiff we should have to overrule that case. But it is said that if we decide for the defendants we shall have to overrule Cooke *v.* Chilcott.[3] If that case was decided on the equitable doctrine of notice, I think we ought to overrule it. But I think there is much to show that the ground of the decision was that Malins, V. C., was of the opinion — wrongly as it now turns out — that the covenant ran with the land, and the decision of the Court of Appeal appears to have proceeded on an admission.

Appeal allowed.[4]

1 Sug. V. & P. 14th ed. p. 590.

2 8 De G. M. & G 815; 26 L. J. (Ch.) 389.

3 3 Ch. D. 694.

4 London Co. *v.* Gomm, 20 Ch. Div. 562, 583 *(semble)*; Austerberry *v.* Corporation, 29 Ch. Div. 750 (to make repairs), (overruling Cooke *v.* Chilcott, 3 Ch. D. 694, invalidating Holmes *v.* Buckley, 1 Eq. Ab. 27, and explaining Morland *v.* Cook, 6 Eq. 252, as a case of a grant of a rent-charge); Clegg *v.* Hands, 44 Ch. D. 503, 519 *Accord.* Whittenton *v.* Staples, 164 Mass. 319 (grantee and assigns of mill site with all the streams, dam, water power, and privileges, etc., to pay grantor and assigns one fifth of the flowage damages caused by the reservoir dam); R. R. Co. *v.* R. R. Co., 171 Pa. 284 (to give traffic to a railroad) *Contra.* — ED.

KING *v.* DICKESON.

In Chancery, before North, J., March 4, 1889.

[*Law Reports*, 40 *Chancery Division*, 596.]

This action was brought by Henry King, claiming an injunction to restrain the defendants from building on a piece of land, situate in Ramsden Road, Balham, in their possession, any building within fifteen feet of Ramsden Road, except fences not more than six feet high.

King's land and the defendant's land had both formed part of lot 258 of a tract of land which had been sold in lots under a general building scheme imposing upon all purchasers the restriction, with others, against building within fifteen feet of Ramsden Road. There were mutual covenants by which the vendor and each purchaser for himself, his heirs, executors, administrators, and assigns, bound himself to the other and his heirs, executors, administrators, and assigns, to observe and comply with these restrictions.

On the 15th of April, 1879, King made an equitable mortgage of part of lot 258 to Messrs. Furber and Price. The mortgagees had notice of the restrictive covenant, but the mortgage contained no stipulation limiting the use of land by them. Furber and Price subsequently acquired title to the mortgaged property under a foreclosure sale and from them it passed by sale to a Mrs. Ball. The defendants were in possession of this property under a building agreement with Mrs. Ball and were about to build beyond the line fixed by the restrictive covenant.[1]

North, J. I think the case is free from doubt. The defendants have acquired part of lot 258, subject to the original restrictive covenant. Other lots of the estate have been conveyed to other purchasers, who, as it appears, have in many instances built on their lots houses having bay windows projecting beyond the building line.

The question for my decision is, whether the defendants, who are purchasers of part of lot 258, upon which they are proposing to build beyond the building line, can be restrained from so doing — not by the purchaser of another lot — but by the owner of the remainder of the same lot 258. There was no agreement entered into between the plaintiff and his mortgagees as to the user of the land comprised in the mortgage, and though, no doubt, the mortgagees took the land subject to the obligations then existing in respect of it, and, therefore, subject to the right of the owners of the other lots to compel the observance of the restrictive covenant, there was nothing to prevent the owner of lot 258 from building upon it in any way he pleased, provided that none of the owners of the other lots objected to his doing so. It has been suggested that the owners of the other

[1] The statement of the case is condensed and the arguments are omitted. — Ed.

lots have in many cases lost by reason of their conduct the right which they originally had to object to a breach of the covenant by the owner of lot 258. If they have all lost that right the owner of that lot would be entitled to build upon it in any way he pleased. It is suggested that the mortgagee of a part of lot 258 entered into some new obligation with his mortgagor, the owner of the other part, as to the user of the mortgaged part. For that suggestion I can see no color whatever. In my opinion the owner of lot 258 conveyed the part of it comprised in the mortgage to the mortgagee subject to all rights then existing in relation to it, but did not by implication create as against the mortgagee any new right or obligation in his own favor, and, not having created any such new right or obligation as against the mortgagee, he cannot now set it up as against a purchaser who derives title through the mortgagee. The action, therefore, fails, and must be dismissed; but this, of course, will not affect any claim which may be made by the owners of the other lots to prevent the defendants from building in contravention of the restrictive covenant.[1]

E. JACKSON AND OTHERS *v.* J. STEVENSON.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JUNE 22, 1892.

[156 *Massachusetts Reports*, 496.]

BARKER, J.[2] In the year 1853 the city of Boston owned a parcel of land known as the Arsenal Estate, in the vicinity of the southerly end of the Common. At this time the estates surrounding the Common were chiefly used for the more expensive residences. The city caused the land to be divided into eight lots and sold. The plaintiffs are the owners of lot No. 8, while the defendant is the owner of lots numbered 4 and 5. In order to provide a general building scheme, and to effect a uniform plan, certain restrictive clauses, intended for the benefit of the lots and of the neighborhood, were inserted by the city in its deeds. The fourth restrictive clause provided that "No dwelling-house or other building except the necessary outbuildings shall be erected or placed on the rear of the said lot." The fifth clause was as follows: "No building which may be erected on the said lot shall be less than three stories high, exclusive of the basement and attic, nor have exterior walls of any other material than brick, stone, or iron, nor be used or occupied for any other purpose or in any other way than as a dwelling-house, apothecary's shop, dry goods store, or grocery store, during the term of twenty years from August 25, 1853."

[1] Dana *v.* Wentworth, 111 Mass. 291, 293 (*semble*); Barney *v.* Everard, 32 N. Y. Misc Rep. 648 *Accord*. 83 N.E. 687.
Winfield *v.* Henning, 21 N. J. Eq. 188 *Contra*. — ED.

[2] Only a portion of the opinion of the court is given. — ED.

The city conveyed the lots Nos. 4 and 5 in 1856, and the plaintiff's lot, No. 8, in 1858. All the lots were conveyed by the city before the year 1864, and dwelling-houses of substantially uniform design were built, which now remain upon lots Nos. 3, 4, 5, 6, 7, and 8.

No objection had been made by the owners of the plaintiff's estate to any structure erected on any of the lots until this case arose in 1891. The master finds that since August 25, 1873, there has been a considerable change in the character of the neighborhood, the houses being no longer used as dwellings exclusively, but devoted to a considerable extent to business purposes, and that the neighborhood is now, to all intents and purposes, a business or mercantile one. The defendant, owning property on Carver Street abutting on the rear of lot No. 4, and intending to erect a market on Carver Street, proposed to build over the entire rear portion of lot No. 4, a brick structure with a flat roof and raised skylight, for use as a part of and a connection between the ground floor of the building on lot No. 4 and his Carver Street property, designed as a store or market, its exact use depending upon future tenants. The plaintiffs, upon ascertaining this, gave notice that they should insist on a compliance with the restrictions, and, this notice being disregarded, brought their bill, alleging that the defendant is about to erect on lot No 4 a building which is not a necessary outbuilding, and asking that he may be perpetually enjoined from placing on the rear of lot No. 4 or No. 5 any buildings except necessary outbuildings.

The master finds that the proposed structure would cause no appreciable diminution of light or air, nor any perceptible damage to the plaintiffs' estate, beyond the possible technical damage which the law may assume.

We assume that when restrictions inserted in the deed of a particular lot are part of a general scheme for the benefit and improvement of all the lands included in a larger tract, a grantee of any part of the land may, under proper circumstances, enforce them against his neighbor.[1] Whitney *v.* Union Railway;[2] Parker *v.* Nightingale;[3] Linzee *v.* Mixer;[4] Tobey *v.* Moore;[5] Beals *v.* Case;[6] Payson *v.* Burnham;[7] and that the restrictions inserted by the city in its deeds were of this nature. Hano *v.* Bigelow.[8] We also assume that the restrictions, except as expressly limited in duration, were intended to be permanent; and that the structures which the defendant proposed to erect were not necessary outbuildings, within the meaning of the

[1] Parker *v.* Nightingale, 6 All. 341; Linzee *v.* Mixer, 101 Mass. 512; Sanborn *v.* Rice, 129 Mass. 387; Tobey *v.* Moore, 130 Mass. 448; Payson *v.* Burnham, 141 Mass. 547; Hopkins *v.* Smith, 162 Mass. 444; Smith *v.* Bradley, 154 Mass. 227 (*semble*); Hano *v.* Bigelow, 155 Mass. 341; Locke *v.* Hale, 165 Mass. 20, 23 (*semble*); Hills *v.* Metzewroth, 173 Mass. 423; De Gray *v.* Monmouth Co., 50 N. J. Eq. 329; Trout *v.* Lucas, 54 N. J. Eq. 361 (*semble*); Tallmadge *v.* East Bank, 26 N. Y. 105; Perkins *v.* Coddington, 4 Rob. (N. Y.) 647; Brouwer *v.* Jones, 23 Barb. 153; Electric Co. *v.* Coal Co., 187 Pa. 500; Greene *v.* Creighton, 7 R. I. 1 *Accord.* — Ed.

[2] 11 Gray, 359.
[3] 6 Allen, 341.
[4] 101 Mass. 512.
[5] 130 Mass. 448.
[6] 138 Mass. 138.
[7] 141 Mass. 547.
[8] 155 Mass. 341.

fourth restriction. Keening *v.* Ayling;[1] Sanborn *v.* Rice;[2] Ayling *v.* Kramer;[3] Hamlen *v.* Werner.[4] We also assume that an owner having the right to enforce such a restriction, if otherwise entitled to sue in equity, is not obliged to wait until after the objectionable structure is erected before bringing his bill; Peek *v.* Matthews;[5] and that relief may be granted, although no actual serious pecuniary damage may have been sustained or is to be expected; Attorney General *v.* Algonquin Club;[6] and that an owner may neglect to object to infractions of restrictions to some extent, without losing his right to enforce the restrictions when they more clearly and seriously affect him. Linzee *v.* Mixer;[7] Payson *v.* Burnham.[8]

Assuming these points in favor of the plaintiffs, we are nevertheless of the opinion that an injunction should not be granted in the present case. It is evident that the purpose of the restrictions as a whole was to make the locality a suitable one for residences; and that, owing to the general growth of the city, and the present use of the whole neighborhood for business, this purpose can no longer be accomplished. If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and, since the changed condition of the locality has resulted from other causes than their breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made.[9] Duke of Bedford *v.* British Museum;[10] German *v.* Chapman;[11] Sayers *v.* Collyer;[12] Columbia College *v.* Thacher;[13] Starkie *v.* Richmond.[14]

But as the plaintiffs have no remedy at law against the defendant, the bill should be retained for the purpose of assessing their damages. Upon the master's report, they are entitled to some damages, and we do not understand him to find that, upon the view which we have taken, the damages are merely nominal. The case is to be referred to an assessor to report the damages caused to the plaintiffs by the erection of the structures which the defendant has caused to be built since the bringing of the bill, but an injunction is denied.[15]

So ordered.

[1] 126 Mass. 404. [2] 129 Mass. 387, 397. [3] 133 Mass. 12, 14.
[4] 144 Mass. 396. [5] L. R. 3 Eq. 515. [6] 153 Mass. 447, 455.
[7] 101 Mass. 512, 531. [8] 141 Mass. 547, 556.

[9] Knight *v.* Simmonds, 1896, 2 Ch. 294; Winnipesaukee Co. *v.* Gordon, 63 N. H. 505 (*semble*); Page *v.* Murray, 46 N. J. Eq. 325; De Gray *v.* Monmouth Co., 50 N. J. Eq. 336; Helmsley *v.* Marlborough Co. (N. J. Eq. 1901) 50 Atl. 14; Lattimer *v.* Livermore, 72 N. Y. 174, 181; Trustees *v.* Thacher, 87 N. Y. 311; Orne *v.* Fridenberg, 143 Pa. 487, 502; Landell *v.* Hamilton, 175 Pa. 327, 337 (*semble*) *Accord.* — Ed.

[10] 2 My. & K. 552. [11] 7 Ch. D. 271, 279. [12] 24 Ch. D. 180, 187.
[13] 87 N. Y. 311. [14] 155 Mass. 188.

[15] Sayers *v.* Collyer, 28 Ch. Div. 103 *Accord.*

Laches or Acquiescence of Plaintiff. The right to enforce by injunction covenants restricting the use of the defendant's land may be lost by laches or by conduct amount-

J. A. NORCROSS AND ANOTHER *v.* W. JAMES.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER 23, 1885.

[140 *Massachusetts Reports*, 188.]

HOLMES, J.[1] One Kibbe conveyed to one Flynt a valuable quarry in Longmeadow, of six acres, bounded by other land of the grantor, with covenants as follows: "And I do for myself, my heirs, executors, and administrators, covenant with the said Flynt, his heirs and assigns, that I am lawfully seized in fee of the afore-granted premises, that they are free of all incumbrances, that I will not open or work, or allow any person or persons to open or work, any quarry or quarries on my farm or premises in said Longmeadow." By mesne conveyances the plaintiffs have become possessed of the quarry conveyed to Flynt, and the defendants of the surrounding land referred to in the covenant. The defendants are quarrying stone in their land, like that quarried by the plaintiffs; and the plaintiffs bring this bill in equity for an injunction.

The restriction is, in form, within the equitable doctrine of notice. Whitney *v.* Union Railway;[2] Parker *v.* Nightingale;[3] Beals *v.* Case.[4] See Austerberry *v.* Oldham;[5] London & South Western Railway *v.* Gomm;[6] Haywood *v.* Brunswick Building Society; Tulk *v.* Moxhay. But as the deed was recorded, it does not matter whether the plaintiff's case is discussed on this footing, or on that of easement, if there is any difference so far as the present point is concerned.

The question remains, whether, even if we make the further assumption that the covenant was valid as a contract between the parties, it is of a kind which the law permits to be attached to land in such a sense as to restrict the use of one parcel in all hands for the benefit of whoever may hold the other, whatever the principle invoked. For equity will no more enforce every restriction that can be devised, than the common law will recognize as creating an easement every grant purporting to limit the use of land in favor of other land.

ing to acquiescence in the non-observance of the defendant's covenant. By reason of such conduct or laches the plaintiff failed in the following cases: Barret *v.* Blagrave, 6 Ves. 104; Roper *v.* Williams, T. & R. 18; Duke of Bedford *v.* Trustees, 2 M. & K. 552; Peek *v.* Matthews, L. R. 3 Eq. 514; Gaskin *v.* Balls, 13 Ch. Div. 324; Sayers *v.* Collyer, 28 Ch. D. 103; Knight *v.* Simmonds, 1896, 2 Ch. 294, 1896, 1 Ch. 53; Water Co. *v.* Bucks, 5 Ga. 315; Duncan *v.* Central Co., 85 Ky. 525; Trout *v.* Lucas, 54 N. J. Eq. 361; Ocean Ass'n *v.* Headley (N. J. Eq. 1901), 50 Atl. R. 78 (see Sutcliffe *v.* Eisele (N. J. Eq. 1901), 50 Atl. R. 69); Orne *v.* Fridenberg, 143 Pa. 487; Landell *v.* Hamilton, 177 Pa. 23; Aldrich *v.* Billings, 14 R. I. 233.

In the following cases the defendant failed to establish laches or acquiescence on the part of the plaintiff: Macher *v.* Foundling Hospital, 1 V. & B. 188; Mitchell *v.* Steward, L. R. 1 Eq. 541; German *v.* Chapman, 7 Ch. Div. 271; Lattimer *v.* Livermore, 72 N. Y. 174. — ED.

[1] The arguments of counsel are omitted, together with a portion of the opinion in which the court discussed the general doctrine of covenants running with the land. — ED.

[2] 11 Gray, 359. [3] 6 Allen, 341. [4] 138 Mass. 138.

[5] 29 Ch. D. 750. [6] 20 Ch. D. 562.

The principle of policy applied to affirmative covenants applies also to negative ones. They must "touch or concern," or "extend to the support of the thing" conveyed. 5 Rep. 16 a, 24 b. They must be "for the benefit of the estate." Cockson *v.* Cock.[1] Or, as it is said more broadly, new and unusual incidents cannot be attached to land, by way either of benefit or of burden. Keppell *v.* Bailey;[2] Ackroyd *v.* Smith;[3] Hill *v.* Tupper.[4]

The covenant under consideration, as it stands on the report, falls outside the limits of this rule, even in the narrower form. In what way does it extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products. If it be asked what is the difference in principle between an easement to have land unbuilt upon, such as was recognized in Brooks *v.* Reynolds,[5] and an easement to have a quarry left unopened, the answer is, that, whether a difference of degree or of kind, the distinction is plain between a grant or covenant that looks to direct physical advantage in the occupation of the dominant estate, such as light and air, and one which only concerns it in the indirect way which we have mentioned. The scope of the covenant and the circumstances show that it is not directed to the quiet enjoyment of the dominant land.

Again, this covenant illustrates the further meaning of the rule against unusual incidents. If it is of a nature to be attached to land, as the plaintiff contends, it creates an easement of monopoly, — an easement not to be competed with, — and in that interest alone a right to prohibit an owner from exercising the usual incidents of property. It is true that a man could accomplish the same results by buying the whole land, and regulating production. But it does not follow, because you can do a thing in one way, that you can do it in all; and we think that, if this covenant were regarded as one which bound all subsequent owners of the land to keep its products out of commerce, there would be much greater difficulty in sustaining its validity than if it should be treated as merely personal in its burden. Whether the latter is its true construction, as well as its only legal operation, and whether, so construed, it is or is not valid, are matters on which we express no opinion. See further Brewer *v.* Marshall;[6] Taylor *v.* Owen;[7] Thomas *v.* Hayward.[8]

Bill dismissed.[9]

1 Cro. Jac. 125. 2 2 Myl. & K. 517, 535. 3 10 C. B. 164.
4 2 H. & C. 121. 5 106 Mass. 31. 6 4 C. E. Green, 537.
7 2 Blackf. 301. 8 L. R. 4 Ex. 311.

9 Taylor *v.* Owen, 2 Blackf. 301 (*semble* — not to carry on a competing business); Brewer *v.* Marshall, 19 N. J. Eq. 537 (four of twelve judges dissenting — not to sell marl in competition with plaintiff); Tardy *v.* Creasy, 81 Va. 553 (two of five judges dissenting — not to carry on a competing business) *Accord.* 41 Minn. 480; 147 Mich. 594; 191 U.S. 99
See also Keppell *v.* Bailey, 2 M. & K. 519. — ED.

A. M. HODGE *v.* RICHARD SLOAN.

COURT OF APPEALS, NEW YORK, OCTOBER 28, 1887.

[107 *New York Reports*, 244.]

THIS action was brought to restrain the defendant from selling sand taken from land conveyed by the plaintiff to John D. Sloan, and by him to the defendant, in violation of a covenant contained in the deed to John D. Sloan, and of which the defendant, when he bought, had notice.[1]

DANFORTH, J. The subject of the contract at the bottom of this controversy was a piece of land which Sloan wanted to buy and which the plaintiff was willing to sell provided it should not be made an instrument for the destruction of his means of livelihood or detrimental to his business. The principle which favors freedom of trade requires that every man shall be at liberty to work for himself, and shall not deprive himself or the state of the benefit of his industry by any contract that he enters into. The same principle must justify a party in withholding from market the tools, or instruments, or means by which he gains the support of his family, or if, as in the case before us, the instrument or means are susceptible of several uses, one of which will work mischief to himself by the loss or impairment of his livelihood, there is no reason of public policy which requires him upon a sale of the instrument to consent to that use, or prohibits him from binding his vendee against it.

We see nothing unreasonable in the restriction which the grantee imposed upon himself. He was not a dealer in sand. He wanted to buy the land on the best terms and in the most advantageous way, and in order to do this it was necessary that he should preclude himself from so using it as that by its means he should enter into competition with the vendor. I cannot find that such a covenant contravenes any rule of public policy, nor that it is incapable of being enforced in a court of equity. It stands upon a good consideration, and is not larger than is necessary for the protection of the covenantee in the enjoyment of his business.

But the question presented is, upon the conceded facts, really one of individual right with which the question of public policy has little if anything to do.

Parties competent to contract have contracted, the one to sell a portion of his land, but only upon such conditions as will protect himself in the prosecution of business carried on upon the residue, the other agreeing to buy for a consideration affected by that condition, and enabled to do so only by acceding to it, and he therefore binds himself by contract to limit the use of the land purchased in a particular

[1] The rest of the statement of the case, the arguments of counsel, and a part of the opinion of the court are omitted. — ED.

manner. There seems no reason why he and his grantee, taking title with notice of the restriction, should not be equally bound. The contract was good between the original parties, and it should in equity at least bind whoever takes title with notice of such covenant. By reason of it the vendor received less for his land, and the plain and expressed intention of the parties would be defeated if the covenant could not be enforced as well against a purchaser with notice, as against the original covenantor. In order to uphold the liability of the successor in title, it is not necessary that the covenant should be one technically attaching to and concerning the land and so running with the title. It is enough that a purchaser has notice of it. The question in equity being, as is said in Tulk *v.* Moxhay, not whether the covenant ran with the land, but whether a party shall be permitted to use the land inconsistently with the contract entered into by his vendor, and with notice of which he purchased. This case is cited and followed as to restrictive covenants in many cases. Brown *v.* Great East. R. Co.;[1] London, etc., Ry. Co. *v.* Gomm.[2] Each case will depend upon its own circumstances, and the jurisdiction of a court of equity may be exercised for their enforcement, or refused according to its discretion, Trustees, etc., *v.* Thacher;[3] but where the agreement is a just and honest one, its judgment should not be in favor of the wrong-doer. Such seems to us the character of the covenant in question; it is restrictive, not collateral to the land, but relates to its use, and upon the facts found the plaintiff is entitled to the equitable relief demanded.

Brewer *v.* Marshall[4] is cited by the respondent as requiring a different construction. The general rules in regard to such covenants are not stated differently in that case. But in the opinion of the court it was not one for the interference of a court of equity. Among many other cases Tulk *v.* Moxhay is cited, and the learned court say: "It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced create easements or are of a nature to run with the land. In some of the instances the language of the court is very clear on this point," and from a "review of the authorities" the court say "it is entirely satisfied that a court of equity will sometimes impose the burthen of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title." The only question which the court regarded as possessed of difficulty was whether the covenant then in controversy was embraced within the proper limits of this branch of equitable jurisdiction. By a divided court an injunction was denied. The circumstances were quite unlike those before us and the decision furnishes no precedent for us to follow.

[1] L. R. 2 Q. B. Div. 406
[2] L. R. 20 Ch. Div. 562, 576.
[3] 87 N. Y. 311.
[4] 19 N. J. Eq. 537.

The judgment appealed from should be reversed and new trial granted, with costs to abide the event.

All concur except PECKHAM, J., not voting, and ANDREWS and EARL, JJ., dissenting because, in their opinion, the covenant was a personal one and did not bind the grantee of the land.

150 Calif. 39; 1902, 2 ch. 612; 155 Ind. 546

Judgment reversed.[1]

HARRIET A. FRANCISCO *v.* CHARLES A. SMITH.

COURT OF APPEALS, NEW YORK, NOVEMBER 27, 1894.

[143 *New York Reports*, 488.]

PRIOR to the 20th day of February, 1888, the defendant carried on the business of baker and confectioner in Little Falls, and on that day he sold to Frank E. Francisco his business and the good will thereof, together with the property contained in his place of business, and agreed with him that he would not, for the period of five years from the 1st day of March then following, engage or become interested in the business of a baker or confectioner in that village. Mr. Francisco's interest came subsequently by purchase to the plaintiff.

From a judgment of the General Term of the Supreme Court the defendant appealed.[2]

EARL, J. It is unquestioned that the agreement entered into by the defendant not to engage in the bakery and confectionery business in Little Falls during the period of five years was legal and valid, and that courts of equity will enforce such agreements for the protection of the business to which they relate. Such an agreement is a valuable right in connection with the business it was designed to protect, and going with the business it may be assigned, and the assignee may enforce it just as the assignor could have enforced it if he had retained the business. The agreement can have no independent existence or vitality aside from the business. If Mr. Francisco had not disposed of the business, and had not himself carried it on, there would have been nothing for the agreement to operate upon — no grounds for equitable relief against a breach thereof, or for recovery in an action at law of anything except possibly nominal damages. He would not have lost the benefit of the agreement by omitting, for any definite

[1] Covenants restraining the defendant, an assignee of the covenantor, from using his land in competition with the business of the plaintiff were enforced by injunction in the following cases: Robinson *v.* Webb, 68 Ala. 393, 77 Ala. 176 (not to build a rival warehouse and steamboat landing on the Mississippi River); McMahon *v.* Williams, 79 Ala. 288 (like the preceding case); Frye *v.* Partridge, 82 Ill. 267 (not to build a rival ferry-landing); Stines *v.* Dorman, 25 Oh. St. 580 (not to build a competing hotel). See also Hitchcock *v.* Anthony, 83 Fed. R. 779; American Co. *v.* Haldeman Co., 83 Fed. Rep. 619, in which cases a lessee was restrained from carrying on a competing business in violation of his covenant with the plaintiff, the lessor. — ED.

[2] The statement of the case is condensed and the arguments of counsel as well as a portion of the opinion of the court, are omitted. — ED.

time during the five years, to carry on the business. The agreement would stand for his protection at any time when he resumed or entered upon the business. Mr. Francisco having the conceded right to sell all the property and the business together, and to assign the agreement at the same time, what is there in reason or principle that precludes him from first disposing of the property and place of business, and afterward selling and assigning to the same person the business and the good will thereof, together with the agreement made for the protection of the business? We can perceive nothing. The assignment of the agreement goes with and is connected with the business as much in the one case as in the other. All concur.

Judgment affirmed.[1]

JOHNSTONE *v.* HALL.

IN CHANCERY, BEFORE SIR W. P. WOOD, V. C., MARCH 11, 1856.

[2 *Kay & Johnson*, 414.]

JOHN HAWKINS, being seised in fee simple of a plot of land in Cheetham in Lancashire, demised it in July, 1838, to one Jacobs for 999 years, the lessee covenanting, with other things, for his heirs, executors, and assigns, that the premises should be used solely for a private dwelling-house or private dwelling-houses.

John Hawkins died in 1841, having devised his interest in these premises to his son, John H. Hawkins, with remainders to the use of the first and other sons of John H. Hawkins, with remainders over to the use of the testator's daughter, the plaintiff, Mary Ann Johnstone.

John H. Hawkins was still a bachelor.

Jacobs' interest in the premises became vested in the defendant Hall, who underlet to the defendant Armstrong. Armstrong was carrying on in the house sublet to him a school for the education of girls.

The bill prayed for an injunction against the continuance of the school in this house.[2]

VICE-CHANCELLOR SIR W. PAGE WOOD. I have not been able to find any case precisely similar to the present, though many approach near to it.

1 Benwell *v.* Innes, 24 Beav. 307; California Co. *v.* Wright, 6 Cal. 258, 8 Cal. 585; Hedge *v.* Lowe, 47 Iowa, 137; Guerand *v.* Dandelet, 32 Md. 562; Watrous *v.* Allen, 57 Mich. 362; Diamond Co. *v.* Roeber, 106 N. Y. 473; Morgan *v.* Perhamus, 36 Oh. St. 517; Reece *v.* Hendricks, 1 Leg. Gaz. R. 79 *Accord.*

Similarly the assignee of one who had bought from a publishing company the exclusive right for a term of years of printing and selling from plates owned by the company may have an injunction against the company and a third person to whom it is about to grant the right of printing from the same plates. Standard Co. *v.* Methodist Co., 33 N. Y. Ap. Div. 409. — ED.

2 The statement of the case is condensed, the arguments, together with a portion of the judgment of the court, in which it was decided that the plaintiff would run no risk of losing her rights by inaction so long as she continued to be a married woman, are omitted. — ED.

I think it clear that the plaintiffs have no remedy at law in respect of the injury alleged to have been committed. They are not precluded from suing at law by the mere circumstance of their being reversioners. Under the statute, 32 Hen. 8, c. 34, they would be entitled at law to the benefit of the lessee's covenants. In Isherwood *v.* Oldknow,[1] where the question arose upon a lease under a power in a will, Bayley, J., held that the Act gave the benefit of the covenants to the persons successively entitled. But, being reversioners, the plaintiffs are precluded from suing at law, unless they can allege and prove special damage to themselves in respect of their interest in the reversion. That was laid down expressly in Jackson *v.* Pesked,[2] and Baxter *v.* Taylor,[3] as well as in earlier cases. The damage so to be alleged and proved may be of various kinds. It may be material injury either to the property itself or to the title of the party suing as reversioner. In one case, Young *v.* Spencer,[4] which was cited in Baxter *v.* Taylor, the damage was by opening a certain door which it was argued might occasion a confusion of boundary, and so affect the evidence of title. That is the only case I have found in which so slight a circumstance has been held to furnish a possible ground for special damage. But all the cases agree, that, in an action by a reversioner, special damage must be alleged and proved.

In this case no special damage is proved. Damage is alleged in the bill in these words: "The carrying on of the said school in and upon the said house and premises is productive of great inconvenience to other tenants of the plaintiffs, and is detrimental to the property of the plaintiffs, as well in consequence of such inconvenience and annoyance as by lowering the character of the said house and of the adjoining property; and thereby the estate and interest of the plaintiffs in the said property will be materially injured, unless the defenddants Hall and Armstrong are restrained from carrying on the said school." But with regard to the damage so alleged, the evidence is all one way. Indeed it is conceded that there is no evidence of such damage as is alleged in the bill.

It does not, however, follow from the mere circumstance of the plaintiffs being without remedy at law, that they are therefore without remedy in this court. In other cases of this character a party who, owing to the peculiar doctrines of courts of law, can have no relief at law, may be relieved in equity. This is especially the case with reference to the doctrine of courts of law respecting covenants running with the land; and it is now quite settled — as was stated by the L. J. Knight Bruce in Coles *v.* Sims,[5] referring to Tulk *v.* Moxhay, which he says was neither the first nor yet the last case in which it has been so held — that this court does not feel itself embarrassed by the consideration whether a covenant does or does not

[1] 3 M. & Selw. 382, 404.
[2] 1 M. & Selw. 234.
[3] 4 B. & Ad. 72.
[4] 10 B. & C. 145.
[5] 5 DeG., Mac. & G. 8.

run with the land, but looks upon it as a contract which, in either case, may afford a ground for relief.

If the plaintiffs were now in possession of the property subject to the lease, no doubt, according to the decision in Kemp *v.* Sober,[1] I must have held that the carrying on of a school was a breach of the covenant, which is, that the lessee should use the premises as a dwelling-house only, and there must have been a decree for specific performance of the agreement as between plaintiffs, so situated, and the defendants. But the plaintiffs are not in that position. They are in the position of reversioners. And what they call upon me to hold is, in effect, that all persons who may successively come into the possession and enjoyment of the property, subject to the lease, are entitled during the existence of preceding estates to have this agreement specifically performed, and to insist on the occupation of the property modo et forma contemplated by the provisions of the lease.

Again, if the plaintiffs, although merely entitled in reversion, were in a position to show that the defendants were carrying on upon the premises some noxious trade, which would occasion such damage to the character of the plaintiffs' property as seriously to injure it, I should have no hesitation in saying, that such a state of circumstances would bring their case within the principle of the cases at law, which all proceed upon the ground that special damage has been done to the reversioner. But neither are the plaintiffs in this position. They have shown no such damage. All they have shown is, that one of the defendants is carrying on a school, which, they allege, but do not prove, will affect the respectability of their property; and they contend that they are entitled, by virtue of the covenant, to have the whole of that property secured in the state of respectability for which the covenant professes to provide.

I have looked in vain for an instance of an action by a reversioner for damages upon such a ground as this. In Garth *v.* Cotton,[2] the leading case in reference to the relief given in this court to a reversioner, Lord Hardwicke, after noticing all the previous authorities, concludes, that in a case where, there being no remedy at law, the plaintiff would sustain a wrong if equity did not interfere, equity will, for that reason, interfere to give relief, because otherwise there would be a wrong without a remedy; and he decided that case accordingly. But in the same case he admits that the court should not extend such interference to trifling matters. Referring to his own decision in the case of Jesus College *v.* Bloom,[3] he says, "I was of opinion that, at the utmost, it was in the discretion of the court; and if the college had a right, they might clearly bring an action of trover at common law; and, it being a matter of small value, I did not think fit to countenance such bills in this court, after the lease expired."

In this case there is no remedy at law, and the question is, whether there is such an injury as this court ought to be called on to redress.

[1] 1 Sim. N. S. 517. [2] 1 Dick. 183. [3] 3 Atk. 262.

In a case resting simply upon covenant, if the party seeking specific performance be entitled in possession, he has a right to the enjoyment of the property modo et forma according to his covenant; but if he be entitled in remainder only, I think he must show that he has sustained some material damage by reason of the breach to entitle him to relief of this nature.

It was argued, that the court will never inquire what is the amount of special damage incurred, but will consider the parties to be bound by their contract; and it is true, that, if the court sees that the actual enjoyment of the property by one of the parties to the contract is interfered with in any manner contrary to what he stipulated for, the court will not enter into his reasons for seeking to have that enjoyment secured to him; but if the application is by a reversioner, I think the court is bound to consider what amount of interest he has in the question.

Nothing so small as the interest of the reversioner in this case could well be presented to the consideration of a court of equity. I am asked, on a lease for 999 years, at a yearly rent of 33*l.* 12*s.* 8*d.*, in which the reversioner is interested subject to a preceding life estate, — the rent being amply secured, — to grant an injunction in order to keep the property for the reversioner in the exact state provided for by the lessee's covenants. I rest my judgment on the ground that the relief asked is so minute that the court will not interfere, as the plaintiffs are not in possession of the property, and there is no case of anything like waste, but only a possibility of the respectability of the neighborhood being in some measure affected. I feel myself at liberty to inquire whether there is any such injury as to authorize me to interfere by injunction, and I think that there is not.

SECTION III.

Legal Consequences of the Right of Specific Performance.

MILNER *v.* MILLS.

In Chancery, before Lord King, C., February 7, 1729.

[*Moseley*, 123.]

The original bill was exhibited by the administrator of Mr. Brown, against his heir at law, for an account of the personal estate of the intestate, which he had taken possession of, and the heir filed a cross-bill against the administrator, to pay the purchase money for certain lands, which Mr. Brown had articled for the purchase of in his lifetime, out of his personal estate, it being a settled rule in chancery, that if a person contracts for the purchase of lands, they shall be considered as real estate, and descend to his heir,[1] or he may devise them by will, and his representatives shall pay the purchase money out of assets.[2] And the Lord Chancellor decreed accordingly in this case.

[1] Alleyn *v.* Alleyn, Moseley, 262; Langford *v.* Pitt, 2 P. Wms. 629; Seton *v.* Slade, 7 Ves. 265, 274; Broome *v.* Monck, 10 Ves. 597, 614, 620; Townsend *v.* Champernowne, 9 Price, 130, 133; Roggenkamp *v.* Roggenkamp, 68 Fed. R. 605; Lowenthal *v.* Home Co., 112 Ala. 108, 113; Gravlee *v.* Williams, 112 Ala. 539, 544; Bank *v.* Kiser, 119 Ala. 194, 200; Musham *v.* Musham, 87 Ill. 80; Schaffner *v.* Grutzmacher, 6 Iowa, 137; Chemedlin *v.* Prince, 15 Minn. 331, 334; Haughwout *v.* Murphy, 22 N. J. Eq. 531, 546; Young *v.* Young, 45 N. J. Eq. 27, 34; Champion *v.* Brown, 6 Johns. Ch. 398; Hathaway *v.* Payne, 34 N. Y. 92, 103; Thomson *v.* Smith, 63 N. Y. 301, 303; Williams *v.* Haddock, 145 N. Y. 144; Griffith *v.* Beecher, 10 Barb. 432, 434; Terrett *v.* Cowenhoven, 11 Hun, 320, 322; Rutherford *v.* Green, 2 Ired. Eq. 121; Sentill *v.* Robeson, 2 Jones, Eq. 510; Buckwalter *v.* Klein, 1 W. L. Bull. (Oh.) 120; Sutter *v.* Ling, 25 Pa. 466, 467; Hall *v.* Vanness, 49 Pa. 457; Landrum *v.* Hatcher, 11 Rich. 54; Stephenson *v.* Yandle, Hayw. 109, 115 *Accord.*

In Seton *v.* Slade, *supra*, Lord Eldon said: "The effect of a contract for purchase is very different at law and in equity. At law the estate remains the estate of the vendor; and the money that of the vendee. It is not so here. The estate from the sealing of the contract is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question, whose it is, is not to be discussed merely between the vendor and vendee; but may be to be discussed between the representatives of the vendee." — Ed.

[2] Broome *v.* Monck, 10 Ves. 597, 611, 620; Daniels *v.* Davison, 16 Ves. 249, 253; Garnett *v.* Acton, 28 Beav. 333; Brewer *v.* Van Arsdale, 6 Dana, 204; Downing *v.* Risley, 15 N. J. Eq. 93; Haughwout *v.* Murphy, 22 N. J. Eq. 531, 546; Young *v.* Young, 45 N. J. Eq. 27, 34; Champion *v.* Brown, 6 Johns. Ch. 398; Cogswell *v.* Cogswell, 2 Edw. Ch. 131 *Accord.* — Ed.

DAIRE *v.* BEVERSHAM.

In Chancery, before Lord Clarendon, C., and Sir Harbottle Grimstone, M. R., Trinity Term, 1663.

[*Nelson*, 76.[1]]

Henry Daire agreed for the purchase of copyhold lands which were surrendered out of court to his use; but he died before admittance, having other copyhold lands, and also having made his will after the said agreement, and thereby devised to the plaintiff and his heirs all his copyhold lands, he being at that time his heir at law: but his wife being with child, was afterwards delivered of a daughter, now the wife of the defendant Beversham.

The plaintiff taking it for law, that the copyhold land for which Henry Daire had contracted, and to which he never was admitted, did not pass by his will; he suffered the daughter to be admitted, and she held the same for 20 years, and the plaintiff paid rent for that time, and agreed so to do as long as he should hold the lands.

Afterwards differences arising between him and her, the plaintiff exhibited his bill to have these copyhold lands decreed to him; and upon hearing the cause, it was declared by the court, that it was clear the copyhold lands for which the testator had agreed, and which were surrendered to him out of court, did pass by his will, though he died before admittance; for that the purchaser had an equity by the contract to recover the same; and the vendor stood entrusted for him till a legal conveyance was executed; and cited Lady Foliamb's case in 1651, wherein it was ruled, that if articles are signed for a purchase, and then the purchaser deviseth the lands, and dieth before any other conveyance is executed, the lands do pass in equity.[2]

But in the principal case no decree was made, because the plaintiff had admitted the title to be in the defendant as heir at law and paid his rent for many years; but declared, if he had come in time, it was proper for a decree.

[1] 1 Ch. Ca. 39 s. c. — Ed.

[2] Prideux *v.* Gibben, 2 Ch. Ca. 144; Greenhill *v.* Greenhill, 2 Vern. 679, Prec. Ch. 320; Trimmel's Case, Mosely, 265, cited; Potter *v.* Potter, 1 Ves. Sr. 437; Broome *v.* Monck, 10 Ves. 597, 605, 614; Wimbish *v.* Montgomery Co., 69 Ala. 575, 578; Buck *v.* Buck, 11 Paige, 337 *Accord.*

But if the contract of purchase was not enforceable by the buyer at the time of the execution of his will, the property, according to the law prior to 1838, would not pass under the will, although the latter purported to devise all the testator's lands. Rose *v.* Cunyngham, 11 Ves. 550. — Ed.

MATTHEWS *v.* GADD.

SUPREME COURT, SOUTH AUSTRALIA, OCTOBER 30, 1871.

[5 *South Australia Law Reports*, 129.]

THIS was an action brought by the plaintiff against the defendant as administrator of the estate of William Gadd, intestate, for wilful default in paying over to the heirs at law a sum of £270 due on a contract made by the intestate for purchase of land, which contract was rescinded subsequently to his death.

Stowe, Q. C., for defendant. A binding contract for the purchase of land by a person who dies converts into realty a portion of the personal estate equal to the purchase money, and no subsequent rescission of the contract by the vendor on the ground of default can affect it. Dart's Vendors and Purchasers; Whittaker *v.* Whittaker.[1]

GWYNNE, J. The doctrine of conversion does not apply, but the deceased at his death possessed an equitable estate in a certain property, which estate passed to his heir. It is doubtful whether the portion of the personal estate representing the purchase money would pass, on the death of the child, to her real or personal representative.

Cur. ad. vult.

GWYNNE, J., now delivered judgment. There is no evidence of wilful default by the defendant in administering the estate of William Gadd, the intestate; the amount of £270 representing the purchase money of real estate bought by the intestate before his death, but the contract for which has been subsequently rescinded, must go to the heir at law out of the personalty.[2]

GREEN *v.* SMITH.

IN CHANCERY, BEFORE LORD HARDWICKE, C., DECEMBER 15, 1738.

[1 *Atkyns*, 572.]

A. articles for the purchase of lands, and dies; it happened afterwards that the seller could not make a good title to the lands, and the question was between the heir at law and the executor of A.; whether the purchase money was to be considered as land or personal estate?

LORD CHANCELLOR, in this cause, laid down the following rules:[3] That where an ancestor, after the making of a will, agrees for the

[1] 4 Bro. C. C. 31.

[2] Whittaker *v.* Whittaker, 4 Bro. C. C. 31; Broome *v.* Monck, 10 Ves. 597 (*semble*); Hudson *v.* Cook, 13 Eq. 417; Lysaght *v.* Edwards, 2 Ch. D. 499, 521, *infra*, 202 *Accord.* — ED.

[3] A portion of the judgment is omitted. — ED.

purchase of particular lands, the heir at law would have a right to them, provided a good title can be made, otherwise if it cannot; but it is going too far to say that though the heir at law cannot have the land, yet he shall have the money so intended to be laid out.[1–2]

That the vendor is, from the time of his contract, considered as a trustee for the purchaser, and the vendee, as to the money, a trustee for the vendor.

BUBB'S CASE.

In Chancery, before Lord Finch, C., Trinity Term, 1678.

[*Freeman, Chancery Cases*, 38.]

Bubb did contract with A. for a parcel of land for £5000, and paid him £140 in part, but before the rest of the money was paid, or any conveyance executed, A. dies, and makes B. his executor, C. being his heir.

B. prefers a bill against Bubb and C. to have the rest of the purchase money; who answered that they did not intend to proceed with the bargain, and Bubb said he was willing to lose his £140 that he had paid.

In this case it was agreed, that Bubb, who was the purchaser, might have preferred his bill against the heir, to have had an execution of a conveyance pursuant to the agreement, by reason the agreement was executed in part in the testator's life-time, by the payment of £140.

But it was insisted by the counsel of Bubb, that by reason he (being the purchaser) did not desire an execution of the agreement, and being content to lose what money he had paid, that the executor should not compel them to it.

But the court ruled that the executor should have the money, and that Bubb might when he pleased compel the heir to execute a conveyance of the estate.[3]

[1] Therefore his Lordship saw no ground for giving directions to perform the agreement or to pay over the purchase money.

[2] Buckmaster *v.* Harrop, 7 Ves. 341; Broome *v.* Monck, 10 Ves. 597, 612, 613; Rose *v.* Cunynghame, 11 Ves. 550; Mills *v.* Harris, 104 N. Ca. 626; Savage *v.* Carroll, 1 Ba. & Be. 265, 281; Newton *v.* Newton, 11 R. I. 390, 394 *Accord.* — Ed.

[3] Baden *v.* Pembroke, 2 Vern. 213; Sikes *v.* Lister, 5 Vin. Ab. 541, pl. 28; Cotter *v.* Layer, 2 P. Wms. 623, 624; Smith *v.* Hibbard, 2 Dick. 730; Bullock *v.* Bullock, 1 J. & W. 603; Farrar *v.* Winterton, 5 Beav. 1; *Re* Manchester Co., 19 Beav. 365; Hoddel *v.* Pugh, 10 Jur. N. s. 534; Fuller *v.* Bradley, 160 Ill. 51; *Re* Wootton, 1 New R. 193; Baldwin *v.* Thompson, 15 Iowa, 504, 508; Boyce *v.* Pritchett, 6 Dana, 231; Hall *v.* Jones, 21 Md. 439; McRae *v.* McRae, 78 Md. 270, 284; Skinner *v.* Houghton, 92 Md. 68, 86; Newton *v.* Swazey, 8 N. H. 9, 14; Haughwout *v.* Murphy, 22 N. J. Eq. 531, 546; Miller *v.* Miller, 25 N. J. Eq. 354; Keep *v.* Miller, 42 N. J. Eq. 100; Hawley *v.* James, 5 Paige, 323, 456; *Re* Everit, 2 Edw. Ch. 597; Williams *v.* Haddock, 145 N. Y. 144; Buckwalter *v.* Klein, 1 W. L. Bull. (Oh.) 120; Hathaway *v.* Payne, 34 N. Y. 92, 103; Swartout *v.* Burr, 1 Barb. 495; Moore *v.* Burrows, 34 Barb. 173; Schroeppel *v.* Hopper, 40 Barb. 425; *Re* Drenkle, 3 Barr, 377; Foster *v.* Harris, 10 Barr, 457; Kerr *v.* Day, 14 Pa. 112, 114; Sutter *v.* Ling, 25 Pa. 466; West Ass'n *v.* Reed, 80 Pa. 38; Simmons' Est., 140 Pa. 567; Bender *v.* Luckenbach, 162 Pa. 18; Stephenson *v.* Yandle, 3 Hayw. 109, 115; Lunsford *v.* Jewett, 11 Lea, 192, 195; Kelley *v.* Kelly, 15 Lea, 194 *Accord.*

Note. That the court took this to be a juggle betwixt Bubb and the heir, supposing that the heir had agreed to pay back the money to Bubb, and so to have kept the land, which was worth much more; for now the heir was to convey the land, but to have nothing for it, for the executor was to have the money.

MAYER *v.* GOWLAND.

IN CHANCERY, BEFORE LORD THURLOW, C., NOVEMBER 31, 1779.

[2 *Dickens*, 563.]

LORD CHANCELLOR.[1] The testator was seised in fee of a manor and farm in Sussex called Mayer. On the 8th of March, 1775, he made his will and thereby devised Mayer farm to Ralph Gowland. Subsequently he entered into a contract with the defendant Dinely to sell to him the Mayer farm for 1500*l.*; and if Banister the tenant should make out a title to any lease, the agreement was to be void.

The bill in the cross cause is, by the devisee of Mayer farm to establish the will to that devise; and by Banister the tenant, to have a lease according to an agreement he sets up, but he cannot make out.

The principal question in this case arises on the estate called the Mayer farm, devised by the will, and which the testator afterwards contracted to sell; by the heirs at law it is insisted, that the agreement with Dinely, though not carried into execution, is a revocation of the will as to that devise, and therefore the estate descended. By the devisee of that estate it is insisted, that if Banister's title to a lease is established, the agreement with Dinely is void, therefore no revocation; that a void agreement is not a declaration of trust, and therefore will not prevent the devise taking effect. And by the residuary legatees it is insisted, that the testator having contracted, it is evident he meant to turn it into personalty, and as such they are entitled to it.

And I am of opinion that the agreement is good, that it ought to be carried into execution; and of consequence, the money arising from the sale is to be considered as personal estate.[2]

In Moore *v.* Burrows, *supra*, E. Darwin Smith, J., delivering the opinion of the court, said: "Upon the decease of the vendor in such a contract his interest in the contract is personal property, like a bond and mortgage, and goes to his personal representatives. . . . The heirs took the title by descent as a mere security in equity for the payment of the debt, precisely as they would have taken it by deed, to hold in trust as security for a debt due to a third person." — ED.

1 Only a portion of Lord Thurlow's judgment is given. — ED.

2 Sikes *v.* Lister, 5 Vin. Ab. 541, pl. 28; Cotter *v.* Layer, 2 P. Wms. 623, 624; Rider *v.* Wager, 2 P. Wms. 328, 332; Rawlins *v.* Burgis, 2 V. & B. 382; Williams *v.* Owens, 2 Ves. Jr. 595, 601; Knollys *v.* Alcock, 5 Ves. 649, 654; Bennett *v.* Tankerville, 19 Ves. 170; Tebbott *v.* Voules, 6 Sim. 40; *Ex parte* Hawkins, 13 Sim. 569; Farrar *v.* Winterton, 5 Beav. 1; *Re* Manchester Co., 19 Beav. 365; Andrew *v.* Andrew, 8 D. M. & G. 336; Coles *v.* Feeney, 52

CURRE *v.* BOWYER.

In Chancery, before Sir John Leach, M. R., 1819.

[5 *Beavan*, 6, *note* (*b*).]

This case was thus stated by Mr. Tinney, who had been counsel in the cause: — A party entered into a contract for the sale of a real estate, and afterwards died before it had been completed. After the lapse of many years, the purchaser filed a bill for specific performance. This was resisted on the ground that the contract had been improvident, and had been obtained at an under-value, and by undue influence. Sir John Leach, however, held that the contract was binding at the death of the vendor, but that by the lapse of time, and by his laches, the purchaser had lost his right to have a specific performance, and that the estate belonged to the next of kin, and not to the heir at law.[1]

THOMAS *v.* HOWELL.

In Chancery, before Kay, J., November 16, 1886.

[*Law Reports*, 34 *Chancery Division*, 166.]

On the 23d of April, 1883, David Morgan Thomas entered into a contract in writing with William Jenkins for the sale of his, Thomas's,

N. J. Eq. 493; Walton *v.* Walton, 7 Johns. Ch. 258, 267, 268; McCarty *v.* Myers, 5 Hun, 83; Donohoo *v.* Lea, 1 Swan, 119 *Accord*.

In Cotter *v.* Layer, *supra*, Lord King, C., said: "Though a covenant or articles do not at law revoke a will, yet, if entered into for a valuable consideration, amounting to a conveyance, they must consequently be an equitable revocation of a will."

Lord Langdale, M. R., in a case arising under the Statute of Wills (1 Vict. c. 26), stated the doctrine as follows: "She [the testatrix] had contracted to sell her beneficial interest. In equity she had alienated the land, and instead of her beneficial interest in the land she had acquired a title to the purchase money. What was really hers in right and equity was, not the land but the money, of which alone she had the right to dispose; and though she had a lien upon the land and might have refused to convey till the money was paid, yet that lien was a mere security, in or to which she had no right or interest, except for the purpose of enabling her to obtain the payment of the money. The beneficial interest in the land which she had devised was not at her disposition; but was, by her act, wholly vested in another, at the time of her death."

In Walton *v.* Walton, *supra*, Chancellor Kent, referring to some of the cases cited in this note, said: "These cases are entirely sufficient to show the settlement of the rule, that a valid contract, for the sale of lands devised, is as much a revocation of the will in equity, as a legal conveyance of them would be at law. The estate, from the time of the contract is considered as the real estate of the vendee." — Ed.

[1] Miller *v.* Miller, 25 N. J. Eq. 354, 365; Keep *v.* Miller, 42 N. J. Eq. 100, 107; Rose *v.* Jessup, 19 Pa. 280; Leiper's App., 35 Pa. 420 *Accord*.

The result is the same if the buyer rightfully abandons the contract after the vendor's death because he could not get a conveyance from infant heirs. Tebbott *v.* Voules, 6 Sim 40; Lysaght *v.* Edwards, 2 Ch. D. 499, 518, 519. — Ed.

share in certain freehold and copyhold farms, lands, houses, in the county of Monmouth, and in a house called "Berthllwyd," in the county of Brecon, for £3000, £5 being paid by Jenkins to Thomas by way of deposit. Thomas died on the 27th of January, 1884, without having completed the contract.[1]

KAY, J. The question is whether the contract of the 23d of April, 1883, operated as a conversion of the property comprised therein into personal estate. There can be no doubt that if it was a binding contract it would operate as a conversion, and what took place after the testator's death would be immaterial. In the course of the proceedings which were taken after his death to carry out the contract, it appeared that the house called "Berthllwyd" was a house to which the testator could make no title, and the result was that the trustees of the will, acting upon the advice of counsel, abandoned the contract, treating it as one which could not be enforced against the purchaser, and the property which did belong to the testator has since been sold under a new contract altogether. Under the circumstances I assume it to be the fact that what the trustees did was properly done in every respect; that is to say, they were satisfied that this house called "Berthllwyd" was such a material part of the property agreed to be sold, that the purchaser could not possibly have been forced to take the rest if they could not make a title to the house.

It is said that there is a rule in equity that where a vendor has entered into a contract for the sale of property to a portion only of which he can make a title, he can be compelled to convey that portion, and to make compensation in respect of the rest. Whether such a rule would apply to this case, I do not consider. There may be such a rule in equity where the purchaser comes for specific performance, but this is rather by way of alteration than performance, of the contract. The question in the present case is whether there was a binding contract. The point arose before the late Master of the Rolls, in the case of Lysaght *v.* Edwards,[2] though no doubt under different circumstances. The question there was whether by virtue of a contract for the sale of real estate the property became converted in equity, so that the vendor, who died before completion, was only a trustee of the property, and whether it therefore passed under a devise of trust estates in his will. That is obviously only a different mode of trying the same question. Here, if the contract was valid, and there had been a devise of trust estates, the property would have passed by the devise. The Master of the Rolls says this: —

"The position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz., possession of the estate and a charge upon the estate for his purchase money. Their positions are analogous in another way. The unpaid mortgagee has a right to

[1] The rest of the statement of the case is omitted. — ED.

[2] 2 Ch. D. 499.

foreclose, that is to say, he has a right to say to the mortgagor, 'Either pay me within a limited time, or you lose your estate,' and in default of payment he becomes absolute owner of it. So, although there has been a valid contract of sale, the vendor has a similar right in a court of equity; he has a right to say to the purchaser, 'Either pay me the purchase money, or lose the estate.' Such a decree has sometimes been called a decree for cancellation of the contract; time is given by a decree of the court of equity, or now by a judgment of the high court of justice; and if the time expires without the money being paid, the contract is cancelled by the decree or judgment of the court, and the vendor becomes again the owner of the estate. But that, as it appears to me, is a totally different thing from the contract being cancelled because there was some equitable ground for setting it aside. If a valid contract is cancelled for non-payment of the purchase-money after the death of the vendor, the property will still in equity be treated as having been converted into personalty, because the contract was valid at his death; while in the other case there will not be conversion, because there never was in equity a valid contract. Now, what is the meaning of the term 'valid contract'? 'Valid contract' means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser — a contract binding on both parties. As regards real estate, however, another element of validity is required. The vendor must be in a position to make a title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title, for however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor. Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase money is unpaid, the contract is valid and binding; and being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase money a part of the personal estate of the vendor, and it makes the land a part of the real estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity."[1] ["That being so, is the vendor less a trustee because he has the rights which I have mentioned? I do not see how it is possible to say so. If anything happens to the estate between the time of sale and the time of completion of the purchase it is at the risk of the purchaser. If it is a house that is sold, and the house is burnt down, the purchaser loses the house. He must insure it himself if he wants to provide against such an accident. If it is a garden, and a river overflows its banks without any fault of the vendor, the garden will be ruined, but the loss will be the purchaser's. In the same way there is a correlative

[1] 2 Ch. D. 506.

liability on the part of the vendor in possession. He is not entitled to treat the estate as his own. If he wilfully damages or injures it, he is liable to the purchaser; and more than that, he is liable if he does not take reasonable care of it. So far he is treated in all respects as a trustee, subject of course to his right to being paid the purchase money and his right to enforce his security against the estate. With those exceptions, and his right to rents till the day for completion, he appears to me to have no other rights."][1]

And further on[2] he says this: "If, on the other hand, the title, being bad and not having been accepted, was in such a state at the time of his death that the purchaser was entitled to refuse the estate, then there was not a valid contract to sell; there was nothing which would have been binding upon the testator's heir, under the doctrine of constructive conversion; and then the testator would have been entitled to the real estate, to the freehold estate free from any contract at all, because the contract he had entered into was not binding."

If I may respectfully say so, that is a statement of the doctrine in which I entirely concur; and therefore, in this case, the title being bad at the time of the testator's death, and not having been accepted by the purchaser in the testator's lifetime nor since his death, and the contract itself having been rescinded because of its invalidity, I am of opinion that the contract did not effect any conversion of the estate in equity.[3]

TOWNLEY *v.* BEDWELL.

In Chancery, before Lord Eldon, C., April 1, 1808.

[14 *Vesey*, 591.]

By the Master's report under an order of reference to state incumbrances it appeared, that a lease had been executed in 1795 by the testator in this cause to Townley for thirty-three years; with a proviso, that, if Townley, his executors, administrators, or assigns, should be desirous to purchase the premises within six years, he, his executors, administrators, or assigns, should pay to the testator, his heirs or assigns, 600*l.* for the purchase upon having a good title made to him, Townley, his executors, administrators, or assigns.

The testator died before the expiration of six years from the date of the lease. After his death, and within that period, Townley declared his option to purchase, according to the proviso.

A petition was presented by the heir at law; praying to be let into possession; and to have the rents, accrued, paid to him out of court.

[1] The bracketed quotation, a continuation of the passage cited by Kay, J., although not included in the latter's judgment, is inserted here for the sake of a further presentation of the views of Jessel, M. R. — Ed.

[2] Ch. D. 515.

[3] Cooper *v.* Jarman, L. R. 3 Eq. 98, 101; Lunsford *v.* Jarrett, 11 Lea, 192 *Accord.* — Ed.

THE LORD CHANCELLOR. — This precise question was decided at the Rolls by Lord Kenyon; holding, that upon such a contract by a lessee, for liberty to purchase the freehold and inheritance within a certain period at a limited price, from the death of the lessor the rent went to the heir; but the money, when the purchase was claimed, belonged to the executor.

THE LORD CHANCELLOR. — The case, to which I alluded yesterday, is Lawes *v.* Bennett;[1] which according to my own note was this.

A person, named Witterwronge, in 1758 demised to Douglas for seven years; with a covenant, that, if after the 29th of September, 1761, and before the 29th of September, 1765, Douglas should choose to purchase the inheritance for 3000*l.*, Witterwronge would convey accordingly. Witterwronge died in 1763: no election having been then made by Douglas; and left all his real estate to John Bennett; and all his personal estate to Bennett and his sister, equally, as tenants in common. In 1765, before the 29th of September, Waller, who had purchased the lease and the benefit of the agreement from Douglas, called upon Bennett, the devisee of the real estate, to convey upon payment of 3000*l.* The bill was filed in 1781 by Lawes, the husband of Bennett's sister, against the personal representative of Bennett, the brother, claiming a moiety of the 3000*l.* and interest; and Lord Kenyon made the decree accordingly; observing, that, though Witterwronge could not have compelled Douglas to purchase, the money was at the time of the election declared to be considered as the personal estate of the testator; and did not belong to the devisee of the real estate.[2]

That case was very much argued; and I do not mean to say, that a great deal may not be urged against it: but, where there is a decision precisely in point, it is better to follow it.

Therefore the rents of the premises demised to Pratt and the rents of the other premises, demised to Townley, until the option, declared by him, belong to the heir;[3] and from the time of that option Townley is entitled to the latter; and must be charged with interest upon his purchase-money; which money and interest are personal estate of the testator; and go to his next of kin.

[1] At the Rolls, February 15th, 1805, since reported, 1 Cox, 167; agreeing with the Lord Chancellor's note.

[2] Collingwood *v.* Row, 3 Jur. N. S. 785; Weeding *v.* Weeding, 1 J. & H. 424; *Re* City of London Act, 30 Beav. 206; *In re* Isaacs, 1894, 3 Ch. 506 (option to be exercised only after death of grantor; grantor died intestate); *Re* Crofton, 1 Ir. Eq. R. 204 (compare *Re* Graves, 15 Ir. Ch. R. 347); Buckwalter *v.* Klein, 1 Oh. W. L. Bull. 120; Kerr *v.* Day, 14 Pa. 112, 115; Newport Works *v.* Sisson, 18 R. I. 411 *Accord.*

Smith *v.* Lowenstein, 50 Oh. 346, *Contra.*

The rule is, of course, the same if there is a contract without a prior option. Knollys *v.* Shepherd, 1 J. & W. 499 cited; Wall *v.* Bright, 1 J. & W. 499; Farrar *v.* Winterton, 5 Beav. 1; Goold *v.* Teague, 5 Jur. N. S. 116; *Re* Manchester Co., 19 Beav. 365; Coles *v.* Feeney, 52 N. J. Eq. 493. But if after giving an option to buy certain property the giver makes a will devising the specific property, the courts, to effectuate the supposed intention of the testator, give to the devisee the land, if the option is not exercised, and the proceeds, if the holder of the option elects to buy. Drant *v.* Vause, 1 Y. & C. C. C. 580; Emuss *v.* Smith, 2 De G & Sm. 722; *In re* Isaacs, 1894, 3 Ch. 506, 510; *In re* Pyle, 1895, 1 Ch. 724; compare Buckwalter *v.* Klein, 1 Oh. W. L. Bull. 120, 125. — ED.

[3] *Re* City of London Act, 30 Beav. 206; *In re* Isaacs, 1894, 3 Ch. 506, 511 *Accord.* — ED.

SUSAN N. THOMPSON *v.* WALTER N. THOMPSON.

SUPREME COURT, NORTH CAROLINA, JUNE TERM, 1854.

[1 *Jones*, 430.]

PEARSON, J.[1] By the Act of 1828, a widow is entitled to dower in an "equity of redemption or other equitable or trust estate in fee, of which her husband died seized." The question is, does the case of a vendee who is let into possession and dies, leaving a part of the purchase money unpaid, and without taking a conveyance, come within the operation of the statute, so as to entitle his widow to dower?

The object of the statute was to abolish the distinction between a legal and equitable estate, in regard to the right of dower, which had been taken to the prejudice of widows, soon after the introduction of the doctrine of "trusts," and uniformly acted upon up to that time, although it was admitted that the effect was to introduce an anomaly, by excluding widows from dower, under circumstances where husbands obtained curtesy.

The prominent word of the statute is "estate," as distinguished from a mere right. We readily yield our assent to the suggestion, that it was not the intention to abolish this distinction, and that as a widow is not entitled to dower where a husband has a mere right at law, so she is not entitled where the husband has a mere right in equity. By way of illustration: the wife of a disseizee, who neglects to enter, cannot claim dower; for, although the husband had a right, which was transmissible by descent, he had no estate; so, where one makes a feoffment upon condition, and dies after condition broken, but without revesting his estate by entry, and afterwards the heir enters and revests the estate, the widow is not entitled to dower. This distinction, which applies where the widow claims dower at common law, is equally applicable where she claims under the statute: for instance, if a trustee sells the land in violation of the trust, and the *cestui que trust* marries and dies without revesting his estate, the widow is not entitled to dower; for he had a mere right to apply to a court of equity, and have the purchaser declared a trustee, if he bought with notice: but, as he did not in his lifetime assert this right, although his heir may do so after his death, it was not intended to give the widow a claim to dower. Indeed, it could not be done, without destroying all analogy between a legal and an equitable estate, which, the intention was, to put on the same footing. So, if a trustee uses money belonging to the trust fund, and invests it in land, although the *cestui que trust* may in equity follow the fund, and claim the land, yet, until he does so, he has a mere right, not an estate.

No question is made as to the distinction between an estate and a right in equity. Indeed, we were informed upon the argument, that

[1] Only a portion of the opinion of the court is given. — ED.

his Honor, in the court below, decided against the widow, upon the ground, that her husband had only a right, and not an estate. So there is no difference of opinion as to the principle; but we think his Honor was mistaken in making the application, and in holding that the vendee had no equitable or trust estate. The ground of the distinction consists in the difference between a trust created by the act of the parties, where he who has the legal estate, consents to hold it in trust for the other, and there is no adverse possession or conflict of claims, and a trust created by the act of a court of equity, where there is a conflict of claims, and the party having the legal estate holds adversely, and does not become a trustee until he is converted into one by a decree founded on fraud, or the like. In the former, the *cestui que trust* has an estate; in the latter, there is a mere right; and the idea of dower or curtesy, is out of the question. So the enquiry is narrowed to this: does the case of a vendee who has been let into possession, and has paid a part of the purchase money, fall under the head of a trust created by the act of the parties, where there is no adverse possession or conflict of claims; or, of a trust created by the act of the court, where there is an adverse possession and conflict of claims, until the legal owner is converted into a trustee by a decree? — Apart from authority, there would seem to be but little difficulty in coming to the conclusion that it is a trust created by the act of the parties. They consent and agree that the legal title shall be retained by the vendor in trust, as a security for the payment of the purchase money, and then in trust for the vendee. So, there is no conflict of claims, or anything adverse in their position towards each other. But the question is settled by the adjudications. 1 Sug. V. and P., ch. 4, sec. 1; ch. 6, sec. 2.

"A contract for the sale of land, enforcible in equity, though in fact unexecuted, is considered as performed, and the land is in equity the property of the vendee." Adams Eq. 140. The vendee is entitled to the rents; if the property decreases in value, the loss is his; if the value is enhanced, it is his gain. At his death, it descends as real estate to the heir, or will pass to a devisee, and they will be entitled to have the price paid out of the personalty. If the contract, after the death of the vendee, be rescinded, his heir or devisee will be entitled to the purchase money. Broome *v.* Monck.[1]

As owner of the estate, the vendee may follow it in the hands of a purchaser, who takes a conveyance with notice. Here we are presented with a striking illustration of the difference between the two kinds of trusts; while the vendor retains the legal estate, the vendee has an equitable estate, and his widow is, under the statute, entitled to dower, and there is no Statute of Limitations to affect him. But if the vendor passes the legal estate out of him, this divests the equitable estate of the vendee. He has then a mere right, and the Statute of Limitations will bar him, unless he asserts his right against one who has taken the legal estate, either as a volunteer or a pur-

[1] 10 Vesey, 597.

chaser, with notice. Hovenden *v.* Lord Annesley;[1] Edwards *v.* University.[2]

It was insisted upon the argument, that the act of 1828, and the act of 1812, which make trust estates subject to sale under execution, ought to receive the same construction; and as the estate of the vendee cannot be sold under the act of 1812, so the widow cannot be entitled to dower in such estate. The conclusion does not follow. The reason why the estate of the vendee cannot be sold under the act of 1812, is, because, under that act, the purchaser becomes entitled to the legal as well as the equitable estate; consequently, it can only apply to a "pure" or "unmixed" trust, as it is termed (although the better expression is, to a case where the trust is held only for one person). For, if the trust be held for another besides the debtor, the statute cannot operate, inasmuch as the trustee should hold the legal title for such other *cestui que trust:* for instance, in the case of the vendee, his estate cannot be sold, because the vendor holds as well to secure the purchase money as in trust for the vendee; and the statute could not have intended the manifest injustice of depriving him of his security, by transferring the legal title to the purchaser under an execution against the vendee.

This reason for excluding such equitable and trust estates from the operation of the act of 1812, has no application whatever to the act of 1828; for, by the latter, the widow takes expressly subject to the rights of the vendor.

Again, it was insisted, if the widow be endowed of one third of the land, although it is subject to the rights of the vendor, still his security will be impaired; for it will be subdivided and split up into several parts. This does not follow. As long as the vendor is content with his security, and permits the widow to continue in possession of the one third allotted to her, she can only be required to keep down the interest upon one third of such part of the purchase money as remains unpaid. When the vendor desires to have his money, if it cannot be made out of the personal estate of the vendee (which is the fund primarily liable), he can file a bill for the specific performance of the contract, and the money must then be paid or raised by a sale of the land. Whether the other two thirds of the land, and the reversion of the third, covered by the dower, will not be bound to exonerate the widow, by being applied to the discharge of the debt of her husband, is a question that we will not now decide, as it was not discussed before us.[3] Analogies may be found in the case of husbands who have taken curtesy in their wives' equities of redemption

[1] 2 Sch. & Lef. 633.

[2] 1 Dev. & Bat. Eq. 326.

[3] In Cahoon *v.* Cooper, 63 N. C. 386, it was decided that if the personal estate was insufficient to pay the purchase money, the heirs of the vendee were bound to exonerate the widow out of their share of the land purchased. But in other jurisdictions the widow, under such circumstances, must contribute her proportion with the heirs in order to retain her dower. Greenbaum *v.* Austrian, 70 Ill. 591 (compare Virgin *v.* Virgin, 189 Ill. 144, 151 — dower in an equity of redemption); Brewer *v.* Van Arsdale, 6 Dana, 204; Harrison *v.* Griffith, 4 Bush, 146; Hart *v.* Logan, 49 Mo. 47; Church *v.* Church, 3 Sandf. Ch. 424; Thompson *v.* Cochran, 7 Humph. 72. — ED.

and other equitable and trust estates; and also, in the case of widows, who have taken dower in the reversion of their husbands, subject to a term for years, conveyed by way of mortgage.

The petitioner is entitled to have dower allotted to her in one third of the house and lot. Judgment below reversed. This opinion will be certified.[1]

PER CURIAM. *Judgment reversed.*

DEAN'S HEIRS *v.* MITCHELL'S HEIRS.

COURT OF APPEALS, KENTUCKY, OCTOBER 9, 1830.

[4 *J. J. Marshall*, 451.]

CHIEF JUSTICE ROBERTSON delivered the opinion of the court.[2]

The only question presented in this case is, whether a wife is entitled to dower, after her husband's death, in land which he had sold, and obliged himself by bond, to convey before his marriage, and for a conveyance of which, the obligee obtains a decree against his heirs.

If T. F. Mitchell, the husband, held the legal title and gave a bond to Mrs. Dean for the conveyance of it to her, he held the title to her use, and was no longer beneficially seized, as long as she claimed and was entitled to a specific execution. If she or her representatives had elected to take, and had received damages in lieu of the title, the beneficial interest in the land would, *ipso facto*, have been re-vested in T. F. Mitchell, by relation, up to date of the bond; and then his wife

[1] Malin *v.* Coult, 4 Ind. 535; Carver *v.* Grove, 68 Ind. 371; Barnes *v.* Gay, 7 Iowa, 26; Bailey *v.* Duncan, 4 Monr. 256; Brewer *v.* Van Arsdale, 6 Dana, 204; Tisdale *v.* Risk, 7 Bush, 139 (*semble*); Ratcliffe *v.* Mason, 92 Ky. 190, 196; Stewart *v.* Beard, 4 Md. Ch. 319; Hart *v.* Logan, 49 Mo. 47; Duke *v.* Brandt, 51 Mo. 221; Young *v.* Young, 45 N. J. Eq. 27, 36; Church *v.* Church, 3 Sandf. Ch. 434; Moore *v.* Burrows, 34 Barb. 173, 174; Klutts *v.* Klutts, 5 Jones, Eq. 80; Fortune *v.* Watkins, 94 N. Ca. 304; Smiley *v.* Wright, 2 Oh. 507; Longwell *v.* Bentley, 23 Pa. 99, 102; Rowton *v.* Rowton, 1 Hen. & M. 92 (*semble*) *Accord.*

Lobdell *v.* Hayes, 4 All. 187, 191 (*semble*) *Contra.*

In several States the widow of the buyer has dower in the property purchased, but not conveyed, only in the event that her husband retained his equitable interest at the time of his death. This qualification of the widow's right is frequently statutory, but in some jurisdictions is the result of judicial decision. *Re* Ransom, 17 Fed. R. 331; Morse *v.* Thorsell, 78 Ill. 600; Heed *v.* Ford, 16 B. Mon. 114; Lynn *v.* Gephart, 27 Md. 547; Worsham *v.* Collison, 49 Mo. 206; Blevins *v.* Smith, 104 Mo. 583, 613, 614; Hicks *v.* Stebbins, 3 Lans. 331; Abbott *v.* Bosworth, 36 Oh. St. 605.

Under such a statutory provision, a contract by the husband to sell his equitable interest is treated as a conveyance of it and his widow can have no dower. McRae *v.* McRae, 78 Ind. 270.

If the contract of purchase was not enforceable by husband at the time of his death, his widow is not entitled to dower in the land covered by the contract. Tink *v.* Walker, 148 Ill. 234; Herron *v.* Williamson, Litt. S. C. 250 (oral contract); Lane *v.* Courtnay, 1 Heisk. 331.

HOMESTEAD RIGHT. The statutory homestead right attaches to land held by a buyer under an executory contract of sale and purchase. Numerous authorities for this proposition may be found in 15 Am. & Eng. Encyc. of Law (2d ed.), 561. — ED.

[2] A portion of the opinion of the court is omitted. — ED.

would be entitled to dower. But as the contract for a title is to be enforced specifically, those who hold the title must be considered as holding it in trust for the benefit of those entitled to it. This trust existed when T. F. Mitchell married. And, therefore, as he has never been, since his marriage, beneficially seized, but held only as trustee, his wife has no right to dower; and this principle has been heretofore established by this court, in the case of Stevens and wife *v.* Smith, decided at the last term.

Wherefore, the decree for dower, is reversed.[1]

GRAHAM *v.* McCAMPBELL.

Supreme Court, Tennessee, April Term, 1838.

[*Meigs*, 52.]

Turley, J., delivered the opinion of the court.[2]

The only question presented for consideration in this case, is whether the assignee of a note given in part of the consideration for the purchase of land, to secure the payment of which the vendor reserved the legal title in himself, giving to the vendee a bond to convey upon the payment of the purchase money, is by virtue of the assignment entitled to have his debt satisfied by a decree of a court of chancery out of the land, there having been no assignment of the security thus reserved by the vendor.

It is argued that he has not upon the authority of the case of Claiborne *v.* Crockett, reported in 3 Yerger, page 27. It is true, that case does support the proposition contended for, the decision having been made upon a state of facts similar to those existing in the present case; but we are not satisfied with the reasoning of the court, and apprehend that the decision was made upon what we consider the erroneous supposition, that the vendor, when he reserved the title to secure the payment of the purchase money, had nothing but a mere lien upon the estate, as it is considered and treated throughout the opinion. The correctness of the opinion depends upon the truth of this proposition, for we concede, that if the vendor has a mere lien for the security of his debt, a transfer of the debt does not of itself transfer the lien. A lien, strictly speaking, is a charge upon property given by operation of law, without the agency of the person benefited by it, in illustration of which may be mentioned, the lien which a vendor has upon the land conveyed, in the hands of the vendee or purchasers under him with notice, to receive the purchase money; the lien which a judg-

[1] Adkins *v.* Holmes, 2 Ind. 197, 199; Kintner *v.* McRae, 2 Ind. 453; Oldham *v.* Sale, 1 B. Mon. 76; Gaines *v.* Gaines, 9 B. Mon. 295; Gully *v.* Ray, 18 B. Mon. 107; Cowman *v.* Hall, 3 Gill, 398; Rawlings *v.* Adams, 7 Md. 26; Firestone *v.* Firestone, 2 Oh. St. 415 *Accord.* — Ed.

[2] Only a portion of the opinion of the court is given. — Ed.

ment creditor has upon the estate of his debtor, for a year after the rendition of his judgment; the lien which an innkeeper has upon the horse of his guest to secure the payment of his bill, etc. In all these cases and others of a similar character, there is nothing but a mere lien to secure the payment of a debt, which being created by operation of law, is confined to the person in whose favor it exists, and has no such connection with the debt, as to cause it to pass by an assignment thereof. That the court in the case of Claiborne *v.* Crockett, considered the security to be of this character, is evidenced, not only by its being so called, but also by the fact, that the authorities cited in support of the decision are all in reference to liens of this description.

This makes it necessary for us to enquire whether the reservation of title, by a vendor, is a mere lien for the payment of the purchase money.

We are not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of the debt and a legal title retained to secure the payment of a debt. In both cases courts of chancery consider the estate only as security for the payment of the debt, upon the discharge of which, the debtor is entitled to a conveyance in the one instance and a re-conveyance in the other. We therefore think, that so far as the question in controversy is involved, the same rules of construction apply equally to a mortgage and an estate the legal title to which is reserved by the vendor, to secure the payment of the purchase money. In the case of Conrad *v.* The Atlantic Insurance Company,[1] Judge Story, in delivering the opinion of the court, says — "it is true, that in the discussions of the course of equity, a mortgage is sometimes called a lien for a debt; and so it certainly is, and something more; it is a transfer of the property itself as security for the debt. This must be admitted to be true at law, and it is equally true in equity, for in this respect, equity follows the law; it does not consider the estate of the mortgage as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties as a qualified estate and security. When the debt is discharged there is a resulting trust for the mortgagor. It is therefore only in a loose sense that it is sometimes called a lien and then only by way of contrast to an estate absolute and indefeasible." These principles apply with equal force to the case of a sale of lands, when the title is reserved by the vendor, so soon as the purchase money is paid, there is a resulting trust for the vendee, which is always enforced by a court of chancery. In the case of a mortgage, the remedy is by bill to redeem, in the case of a sale without conveyance by bill for a specific performance of the contract; and as the land is considered only as security for the debt, the parties have a natural right to ask the aid of the court of chancery to enforce the payment by a sale of the property.

The land then being a security for the payment, it follows, as we

[1] 1 Peters' Rep. 441.

think by necessary analogy, that a transfer of the debt is a transfer in equity of the security. . . .[1]

The debt in these cases is considered as the principal, and the land as an incident only; they prove beyond a doubt, that the assignee of a debt secured by a mortgage, is entitled to have it paid out of the mortgaged estate if need be, although he has had no assignment of the estate; they apply, as we think with equal force to the case of an assignee of a debt secured by a reservation of the title by the vendee; and we hold that in each case, the assignee may file a bill to subject the estate to the payment of his debt, although there has been no assignment of the estate to him, and that the case of Claiborne *v.* Crockett, so far as it conflicts with this view, must be overruled.

The judgment of the Chancellor will be reversed and a decree given for the complainants in conformity with this opinion.[2]

O. R. YOUNG *v.* T. J. GUY.

Court of Appeals, New York, January 17, 1882.

[87 *New York Reports*, 457.]

Danforth, J.[3] The judgment satisfied neither plaintiff nor defendant, and both have appealed. So far as material to the question put by either, the facts are few. Each claims through Albert W. Scribner. On the 20th of October, 1874, he was the owner in fee of a certain lot of land called No. 3. On that day he in writing bargained, sold, and agreed to convey the lot to the defendant, free from incumbrances and with warranty, for $8,500. The defendant agreed to purchase at that price, and pay $2,200 on the execution of the agreement, the balance May 1, 1875, as follows: by cash, $1,800, assume a mortgage of $2,000 then on the property, and held by the Troy Savings Bank, and $2,500 by a purchase-money bond and mortgage, payable in two years thereafter. At that time (May 1, 1875) possession was to be given, and a warranty deed executed. The savings bank

[1] The court here quoted from or summarized Martin *v.* Mowlin, 2 Burr. 979; Auston *v.* Burbank, 2 Day, 474; Green *v.* Hart, 1 Johns. 80, and Runyan *v.* Mersereau, 11 Johns. 534.

[2] Roper *v.* McCook, 7 Ala. 318; Kelly *v.* Payne, 18 Ala. 371; Conner *v.* Banks, 18 Ala. 42; Wells *v.* Morrow, 38 Ala. 125; Wolffe *v.* Nall, 62 Ala. 24; Lowery *v.* Peterson, 75 Ala. 109; Moore *v* Andros, 14 Ark. 628; Garrett *v.* Williams, 31 Ark. 240; McConnell *v.* Beattie, 34 Ark. 113; Martin *v.* O'Bannon, 35 Ark. 62; Gessner *v.* Palmater, 89 Cal. 89; Wright *v.* Troutman, 81 Ill. 374; Hutchinson *v.* Crane, 100 Ill. 269; Lewis *v.* Shearer, 189 Ill. 184; Lagon *v.* Badollet, 1 Blackf. 416; Bromfield *v.* Palmer, 7 Blackf. 227; Johns *v.* Savell, 33 Ind. 1; Jackson *v.* Snell, 34 Ind. 241; Felton *v.* Smith, 84 Ind. 485 (*semble*); Stevens *v.* Chadwick, 10 Kan. 406; Lusk *v.* Hopper, 3 Bush, 179; Bradley *v.* Curtis, 79 Ky. 327; Tanner *v.* Hicks, 12 Miss. 294; Parker *v.* Kelly, 18 Miss. 184; Terry *v.* George, 37 Miss. 539; Adams *v.* Cowherd, 30 Mo. 458; Dickason *v.* Fisher, 137 Mo 342, 358 (*semble*); Hadley *v.* Nash, 69 N. C. 162; Dishmore *v.* Jones, 1 Heisk. 554; McClintic *v.* Wise, 25 Grat. 448; Church *v.* Smith, 39 Wis. 492 *Accord.* — Ed.

[3] Only the opinion of the court is given. — Ed.

mortgage was assumed but the defendant having advanced money to pay off certain prior incumbrances, paid only $1,006.61, instead of $1,800, gave his bond and mortgage for the residue of the purchase-money $1,300 instead of $2,500; and thereupon receiving his deed, put it on record and went into possession of the premises. On the 20th of May, 1875, the purchase-money mortgage was recorded; and on the 22d of June, sold for a valuable consideration to Isaac G. and William A. Flacks, who bought the same in good faith. In the mean time, and on the 2d of February, 1875, Scribner, being indebted to the plaintiff in the sum of $6,000 upon certain promissory notes then past due, gave to him his bond conditioned for the payment of $7,000, and, as security for the same (as it recited), a mortgage upon said lot No. 3, as collateral security for the payment of the past-due indebtedness. No extension of time of payment was given, nor any new consideration whatever. The notes were not surrendered or cancelled, or the obligation imposed thereby in any manner impaired or affected. The mortgage was duly recorded on the 3d day of February, 1875, and on the 11th day of February, 1876, this action was brought for its foreclosure. The vendee and grantee Guy, and the Messrs. Flack, the assignees of the mortgage, were made defendants, as persons having an interest in the mortgaged premises subsequent to the mortgage. After the commencement of the action, Guy, on the demand of Messrs. Flack, paid to them the $1,300, secured by the purchase-money mortgage, and it was discharged of record. The transactions of May 1, and prior thereto, under the agreement were without notice on the defendant Guy's part of any claim of the plaintiff, or of the bond and mortgage.

The referee reported in favor of the plaintiff, $1,300 and interest; that being the amount called for by the purchase-money mortgage, and unpaid at the commencement of the action. To this the defendant Guy objects. The plaintiff insists that the referee should also have allowed the above sum of $1,006.61, paid by Guy, May 1, 1875. These claims present the only points in the case. Both were overruled by the General Term. *First*, the plaintiff's appeal: The contract of sale was valid between Scribner and Guy at a time anterior to the plaintiff's mortgage. Guy, from the moment of its execution, held the equitable title to the land, subject only to the payment of the amount due on his contract, and was entitled, on paying or securing that amount according to its terms, to a conveyance free from any lien created by Scribner. If denied, it would have been compelled, on application to a court of equity, and when executed, would be good by relation from the time of the making the contract, so as to render valid every intermediate act in pursuance of it, on the part of the vendee.

In Jackson *v.* Bull,[1] the doctrine of relation was applied to avoid the effect of an adverse possession intermediate the agreement and the deed, and it avails whenever it becomes necessary to promote the

[1] 1 Johns. Cas. 81.

ends of justice. If this was a controversy between Guy and Scribner, it could not be questioned but that the deed of May 1, 1875, would take effect as if executed at the time of the agreement. In what respect is the position of the plaintiff better than that of Scribner? The Recording Act protects only purchasers in good faith and for a valuable consideration, against an unrecorded conveyance; and the plaintiff is not one of that character, for, as we have seen, he parted with nothing on the strength of his mortgage. It is true that he had no notice of the agreement, or the claim of Guy under it. But this is not material. If he had, it would only have furnished another reason for his defeat. As it is he parted with nothing on the strength of his debtor's title, and, although the consideration of an antecedent debt is sufficient to support the mortgage, it does not bring him within the meaning or the protection of the Recording Act, nor enable him to occupy any different position in respect to the vendee under the agreement, than that held by Scribner. Dickerson *v.* Tillinghast;[1] Weaver *v.* Barden.[2] The case of Governeur *v.* Lynch,[3] cited by the plaintiff's counsel, so far as it implies a contrary doctrine, or that the mere recording of the mortgage would affect the vendee, must be deemed overruled by Trustees of Union College *v.* Wheeler.[4]

The payment therefor, of $1,006.61, relates back to the time of making the agreement and is good by that relation.[5] Parks *v.* Jackson;[6] Moyer *v.* Hinman;[7] Trustees, etc., *v.* Wheeler. But so far as the decision gives priority to the mortgage in suit, to the extent of $1,300 and interest, it is correct and is well sustained by the reasons assigned by the majority of the court at General Term.[8]

If payment had been made in money, it would have been effectual according to the reasoning already applied to the other question. But it was not. The bond and mortgage were mere choses in action, and could not have been enforced by Scribner to the prejudice of the plaintiff. The Flacks were not only affected by the equities which restrained the enforcement of the mortgage by Scribner, Delancey *v.* Stearns,[9] but were charged by the record with notice of the plaintiff's mortgage, as the defendant Guy also was, by the commencement of this action. The subsequent payment, therefore, by him should not operate to the prejudice of the plaintiff.

We think the judgment appealed from should be affirmed, but as both parties have appealed and neither succeeded, it should be without costs of this appeal to either party. All concur.

Judgment affirmed.

[1] 4 Paige, 215. [2] 49 N. Y. 286. [3] 2 Paige, 300. [4] 61 N. Y. 88.

[5] That the buyer may safely pay the purchase money to the seller so long as he has no knowledge of the assignment, is well settled. Doolittle *v.* Cook, 75 Ill. 354; Ranney *v.* Hardy, 43 Oh. St. 157; Jaeger *v.* Hardy, 48 Oh. St. 335; Ten Eyck *v.* Simpson, 1 Sandf Ch. 244 (*semble*). — ED.

[6] 11 Wend. 442. [7] 13 N. Y. 180. [8] 12 Hun, 325; 23 Id. 1. [9] 66 N. Y. 157.

19 Utah 1.
23 " 576 — contra

42 Fed. 199, 216 — decision in accord with Y. v. G.

LUKE BLACKMER *v.* PHILLIPS.

SUPREME COURT, NORTH CAROLINA, JUNE TERM, 1872.

[67 *North Carolina Reports*, 340.]

THIS was a civil action, tried before Cloud, J., at Spring Term, 1872, of Rowan Superior Court.

The parties agree upon the facts as follows:

M. A. Smith was the owner in fee of a house and lot in Salisbury, and on the 10th day of October, 1868, contracted to convey the same in fee to the defendant for $2400; $800 was paid in cash, and defendant executed two notes of $800 each, one payable in twelve months, and the other in twenty-four months, from January 15th, 1869, to secure the purchase money and was let into possession. At Spring Term, 1869, plaintiff obtained judgment against Smith and had the same docketed 15th October, 1869; execution was issued and Smith's interest in the house and lot was sold, and plaintiff became the purchaser, and took a sheriff's deed; that thereafter, and before the docketing of the judgment, M. L. Holmes became the purchaser of the two outstanding notes of $800, for full value and before maturity. Holmes had no actual knowledge of the existence of the judgment, and he bought before the sheriff's sale. He demanded payment of the notes from the defendant, who paid off the same about the — day of January, 1870, and defendant took a deed from Smith for the premises. After the rendition of the judgment plaintiff notified the defendant thereof, and notified him to pay the balance of the purchase money to him, and not to pay any part thereof to Smith. The defendant stated that he certainly would not pay any more of the purchase money to Smith, unless he would make him a sure title, and did not pay to Smith, but the whole to Holmes, as aforesaid. Holmes took a mortgage from the defendant on the premises January 6, 1870, to secure payment of a loan, and, at the time, knew of the existence of said judgment.

The plaintiff asked for judgment against the defendant "for the sum of sixteen hundred dollars, with interest thereon from 15th of January, 1869, being the amount due the said Smith at the time of filing the judgment roll aforesaid, to be paid by a day to be named, *when* plaintiff will execute a title to defendant for the premises, and in default thereof, that said house and lot be sold for the payment of said sum of money, and interest with costs, etc., etc."

Upon this state of facts, his Honor was of opinion that plaintiff could not recover, and gave judgment for the defendant.

PEARSON, C. J. On the case agreed, the plaintiff insists that he is entitled to judgment; that the defendant pay to him the amount of the two notes, given by defendant to Smith, for the balance of the

purchase money, or else that the house and lot be sold to satisfy the same.

On the contrary, the defendant insists that as he has paid the amount of the two notes to Holmes, who was a *bona fide* holder, for full value and without notice, by indorsement of the notes before maturity, he has performed the condition of the contract of sale on his part, and is entitled to judgment that the plaintiff convey to him the legal estate in the house and lot.

The two notes given by the defendant to Smith, for the balance of the purchase money, were negotiable, and we see no principle on which it can be contended that a *bona fide* holder, by indorsement before maturity, had not a right to receive payment of the same. The balance of the purchase money being thus paid, we can see no principle on which it can be contended that Phillips is not entitled to have a conveyance of the legal estate, according to the title bond executed to him by Smith.

It was urged by the plaintiff's counsel that the effect of the sheriff's deed was not only to vest in Blackmer the legal title to the house and lot, but also to vest in him the ownership of the two notes, as an incident to the land, so that an indorsement by Smith, after his title in the notes was thus divested, is void and can have no legal effect.

The two notes were negotiable, and according to the law merchant, a *bona fide* indorsee, before maturity, took them free from all equities or drawbacks, except indorsed payments. This settles the question. We are not to be understood as conceding the position that the plaintiff, by the sale and sheriff's deed for the house and lot, acquired not only the legal estate in the house and lot, but also became the owner of the two notes, as "incident" thereto. We look upon it, in the view of considering the two notes, as the principal or primary matter, to secure the payment of which the legal estate was retained by Smith, the vendor. So the legal title in the house and lot was retained as an *incident* to secure the payment of the two notes given for the balance of the purchase money.

The effect of the contract of sale — payment of a part of the purchase money — the two notes for the balance, and bond to make title, was to vest in the vendee (the defendant) an equitable estate in the land; in other words, in equity, Phillips thereby became the owner of the house and lot, subject to the incumbrance of paying the balance of the purchase money before he could call for a conveyance of the legal estate. So that Smith held the legal estate as a trustee, in the first place, to secure payment of the two notes, and then in trust to convey to Phillips.

As Smith held the legal estate, assuming that it was liable to sale under execution; what did the purchaser acquire by the sale and sheriff's deed? The sheriff was only authorized to sell the lands and tenements of the defendant in the execution, that of course passed by his deed; but how could the sale of the house and lot have the effect of

passing the title to the two notes? To this interrogatory, the learned counsel could only reply "it passed as an *incident* to the land," and the land was bound from the time of the "judgment docketed;" admit that the land was bound, how does it follow that the two notes passed by the sheriff's deed? The two notes were not the subject of execution. The sheriff did not sell them, and had no power to do so. According to the case of Giles *v.* Palmer,[1] the sheriff's sale passed the naked legal title, and the purchaser could get a judgment in an action of ejectment: but it is said in that case, "should the plaintiff attempt to deprive the trustee of the possession of the premises, the remedy of the *cestui que trust* will be in a court of equity." This control which has been exercised by courts of equity accounts for the fact that the legal title of trustees has been seldom ever interfered with. The widow of a trustee is entitled to dower, and yet it is never claimed; for the reason that an injunction would issue. A mortgagee dies, the land descends to the heir, and the widow gets dower, but *the debt* belongs to the personal representative, and upon payment to him the heir and widow will be decreed to make title. This is a matter of every day occurrence, no one has ever insisted that the *debt* passed with the land "as an *incident*." In our case, if Smith had died, the land would have descended to the heir, but "the two notes" would have belonged to his personal representative, and on payment to him Phillips would have been entitled to call upon the heir for a conveyance of the legal title, or accepted a deed from the administrator. The idea that by a purchase at sheriff's sale of the legal estate of Smith, the plaintiff (who held in trust to secure the payment of the two notes and then in trust to make title to Phillips) not only got the legal estate, but also acquired a right to the two notes for the balance of the purchase money, is so "wide of the mark," especially when this right is asserted against a *bona fide* holder, that we would not seriously discuss it, except for the fact that the plaintiff is a member of the profession, and the learned counsel who argued the case for him seemed to be much in earnest, although he did not cite any case or give any reason in support of the position that the two notes passed to the plaintiff as incident to his purchase of the legal estate. The action is for the amount of the two notes, and not for the house and lot, except to have it sold, if necessary, to satisfy the two notes. So the gravamen is the right of the plaintiff to the two notes, and the matter is not complicated by an action to recover the land upon the legal title, and thus force the defendant into equity under the old system; or to his equitable defence under the new mode of procedure; thus marching directly up to the question, and showing confidence in the position. The matter is too plain for further discussion. I will only ask a question by way of illustration. A deed is made to A, in trust to sell and pay certain creditors. A is one of the secured creditors. The estate of A in the property is sold at execution sale; does the purchaser of the sheriff's

[1] 4 Jones, 386.

deed acquire title to the debt which is due to A, and is secured by the deed of trust?

There is no error.

PER CURIAM. *Judgment affirmed.*[1]

R. O. LEDBETTER *v.* JOHN ANDERSON AND OTHERS.

SUPREME COURT, NORTH CAROLINA, JANUARY TERM, 1868.

[*Phillips*, 323.]

BILL filed to Fall Term, 1862, of the Court of Equity for Rutherford, and at Fall Term, 1866, set for hearing upon the pleadings and proofs, and transmitted to this court.

The complainant alleged that he had purchased at execution sale the interest of the defendant Anderson in a certain tract of land, and had received a sheriff's deed therefor; that Anderson's interest was by virtue of a bond for title from the defendant Frazer; that he had offered to pay Frazer the balance due to him upon such bond, and now brings the same into court for the same purpose; that Frazer and Anderson had conspired to defraud him, etc.

[1] Doolittle *v.* Cook, 75 Ill. 354; Jackson *v.* Snell, 34 Ind. 241 (*semble*); Hadley *v.* Nash, 69 N. Ca. 162; Catlin *v.* Bennett, 47 Tex. 165 *Accord*.

(In many jurisdictions, a judgment creditor of a vendor who has not conveyed the title, and a purchaser under an execution sale against such vendor acquires the right to charge or to hold the legal title as security for the unpaid purchase money.) (But this right of the creditor or execution purchaser is subject to diminution by any payment of the vendee to the vendor, in ignorance of the judgment or execution sale.] Doe *v.* Haskins, 15 Ala. 619; Hardee *v.* McMichael, 68 Ga. 678; Bell *v.* McDuffie, 71 Ga. 264; Leitch *v.* May, 98 Ga. 714; Simpson *v.* Niles, 1 Ind. 196; Gaar *v.* Lockridge, 9 Ind. 92; Jackson *v.* Snell, 34 Ind. 241, 243; Burke *v.* Johnson, 37 Kan. 337; Doe *v.* Million, 4 J. J. Marsh. 395 (but see Cooper *v.* Arnett, 95 Ky. 603); Hampson *v.* Edelin, 2 Har. & J. 64 (see Skinner *v.* Houghton, 92 Md. 68, 86); Doak *v.* Runyon, 33 Mich. 75; Corey *v.* Smalley, 106 Mich. 257; Filley *v.* Duncan, 1 Neb. 134; Courtnay *v.* Parker, 16 Neb. 311; Olander *v.* Tighe, 43 Neb. 344; Wehn *v.* Fall, 55 Neb. 547; Moyer *v.* Hinman, 13 N. Y. 180; Lane *v.* Ludlow, 6 Paige, 316, n.; Smith *v.* Gage, 41 Barb. 60; Butler *v.* Brown, 5 Oh. St. 211; Jefferson *v.* Dallas, 20 Oh. St. 68 (departing from Manley *v.* Hunt, 1 Oh. 257, but approved in Wright *v.* Franklin Bank, 59 Oh. St. 81, 92, and Coggshall *v.* Marine Co. 63 Oh. St., 88, 96); Fasholt *v.* Reed, 16 S. & R. 266; McMullen *v.* Wenner, 16 S. & R. 18; Stewart *v.* Coder, 11 Pa. 90; Patterson's Estate, 25 Pa. 71; Kinports *v.* Boynton, 120 Pa. 306; Snyder *v.* Botkin, 37 W. Va. 355.

In several States a judgment creditor of the unpaid vendor acquires nothing by his judgment; and the same is true of a purchaser under an execution against the vendor if he has notice of the buyer's rights; and this is usually the case, for the buyer's possession is constructive notice of his rights. Strauss *v.* White, 66 Ark. 167; Baldwin *v.* Thompson, 15 Iowa, 504; Woodward *v.* Dean, 46 Iowa, 499 (see also Benbow *v.* Boyer, 89 Iowa, 494); Money *v.* Dorsey, 15 Miss. 636; Taylor *v.* Lowenstein, 50 Miss. 278; Chisholm *v.* Andrews, 57 Miss. 636; Jones *v.* Howard, 142 Mo. 117; Tally *v.* Reed, 72 N. Ca. 336; Folger *v.* Bowles, 72 N. Ca. 603; Adickes *v.* Lowry, 15 S. Ca. 128. But a *bona fide* purchaser under an execution sale against a vendor acquires the entire interest in the land free from the equity of the buyer. Rogers *v.* Hussey, 36 Iowa, 664; Jones *v.* Howard, 142 Mo. 117, 126; Paine *v.* Mooreland, 15 Oh. 435.

If the buyer has paid all the purchase money, he may obtain an injunction against a sale under execution against the seller. Finch *v.* Earl of Winchelsea, 1 P. Wms. 277 (*semble*); Prior *v.* Penpraze, 4 Price, 99; Lodge *v.* Lysley, 4 Sim. 76; Valentine *v.* Seiss, 79 Md. 190. — ED.

The prayer was that Frazer be compelled to take the money and make a title, or that the land be sold for the plaintiff's indemnity, and for other relief.[1]

READE, J. From the bill, as well as from the answers, it appears that the defendant Anderson had only a bond for title to the land levied upon by the sheriff under whose sale the plaintiff purchased, and that Anderson had paid only a part of the purchase money.

It is well settled that a purchaser of land holding only a bond for title, without having paid the *whole* of the purchase money, has no such interest in the land as is subject to execution. The plaintiff therefore obtained no title by his purchase.

The case is not altered by his offering to pay the balance due, nor by his bringing the money into court. Having acquired no interest in the land, his offering to pay for it is no more than if he were to offer a certain price for any other tract of land and then file a bill to obtain a title.

The bill must be dismissed, with costs.

PER CURIAM. *Decree accordingly.*[2]

1 The statement of the case is abridged. — ED.

2 The North Carolina statute was similar to the English statute 29 Charles II. c. 3, § 10, and operated, after the analogy of the Statute of Uses, to vest the legal title in the purchaser under the execution, wherever the execution debtor like a *cestui que* use had the entire unincumbered beneficial interest. Patterson *v.* Bodenhamer, 9 Ired. 96; Williams *v.* Council, 4 Jones (N. Ca.) 206; Tally *v.* Reed, 72 N. Ca. 336; Hinsdale *v.* Thornton, 75 N. Ca. 381. Similar statutes have received a similar interpretation in other states. Moore *v.* Simpson, 3 Met. (Ky.) 349 (*semble*); Goodwin *v.* Anderson, 13 Miss. 730; Harmon *v.* James, 15 Miss. 111; Ellis *v.* Ward, 15 Miss. 651; Delafield *v.* Anderson, 15 Miss. 630; Bogert *v.* Perry, 17 Johns. 351, 1 Johns. Ch. 52; Sage *v.* Cartwright, 9 N. Y. 49; Trimm *v.* Marsh, 54 N. Y. 599, 612 (compare Jackson *v.* Scott, 18 Johns. 94; Jackson *v.* Parker, 9 Cow. 73); Shute *v.* Harden, 1 Yerg. 1. In Indiana the statute does not permit the buyer's interest to be taken on a common law execution, even though he has paid all the purchase money, so that the seller has become a bare trustee. Gentry *v.* Allison, 20 Ind. 481; Jeffries *v.* Sherburn, 21 Ind. 112; Hanna *v.* Aebker, 84 Ind. 411, 415.

But the interest of the buyer who has not yet obtained a conveyance may be taken on execution under statutes authorizing execution against the debtor's interest in lands. Hardy *v.* Heard, 15 Ark. 184; Young *v.* Mitchell, 33 Ark. 222; Fish *v.* Fowlie, 58 Cal. 373; Crosby *v.* Elkader Lodge, 16 Iowa, 399; Rand *v.* Garner, 75 Iowa, 311; Sheppard *v.* Messenger, 107 Iowa, 717, 720; Shanks *v.* Simon, 57 Kan. 385; McMechen *v.* Marman, 8 Gill & J. 57; Reynolds *v.* Fleming, 43 Minn. 513; Block *v.* Morrison, 112 Mo. 343; Jones *v.* Howard, 142 Mo. 117, 123; Auwerter *v.* Mathiot, 9 S. & R. 397; McMullen *v.* Wenner, 16 S. & R. 18, 21; Russell's App., 15 Pa. 319; Vierhaller's App., 24 Pa. 105; Van Camp *v.* Peerenboom, 14 Wis. 65; Bartz *v.* Paff, 95 Wis. 95.

In some States a creditor may reach his debtor's interest under a contract of purchase of land under a statute dealing specifically with such interests. Stewart *v.* Berry, 84 Ga. 177; Houston *v.* Jordan, 35 Me. 520.

In the absence of statutes a creditor's remedy against the purchaser must be by a bill in equity for equitable execution. It is hardly necessary to add that the holder of an unexercised option to buy land has not such an interest therein as may be reached by his creditors. Provident Co. *v.* Mills, 91 Fed. R. 435. — ED.

LYDIA M. TAYLOR *v.* ALEXANDER KELLY AND OTHERS.

SUPREME COURT, NORTH CAROLINA, JUNE TERM, 1857.

[3 *Jones, Equity*, 240.]

CAUSE removed from the Court of Equity of Moore County.

The bill was filed against the defendants, for a specific performance of a contract to convey a tract of land, which is alleged to be contained in the following written instrument, viz.:

"January 25th, 1850. Received of Mrs. Lydia Margaret Taylor, an order on Col. S. J. Person, for two hundred dollars, with interest from the 25th of April, 1849, which, when paid to me, is to be in full satisfaction and payment for the land on which she now lives, and I am to give her a deed for the same.

"Test, Wm. Wadsworth. ALEXANDER KELLY."

The defendant Kelly instituted an action of ejectment against Mrs. Taylor and her father, Carroll Brady, returnable to October Term, 1851, of Moore County Court, and obtained a judgment at October Term, 1852.

At that term, plaintiff tendered Kelly the unpaid balance of the purchase money and the costs that had accrued in the action of ejectment, and required of him to execute a deed for the land, which had been prepared for that purpose, and was then produced for him to sign, but he refused to take the money, or execute the deed, and offered, instead thereof, to settle the matter by paying back the money he had received from the plaintiff.

While the action of ejectment was pending, to wit, on the 16th day of April, 1852, Kelly sold and conveyed the land in question, with warranty, to Thomas Dixon, David Dixon, Solomon Dixon, John Dixon, Caleb Dixon, and Joseph Dixon, for the purpose of erecting mills upon the same. They took possession of a mill-seat on the premises, and proceeded to erect buildings and machinery on the same; and after operating there for a year or so, they sold the land and works to the defendants, Woody and Thomas Dixon, for $4000. This was on the 4th of Nov., 1853.

While the Dixons were erecting their works, the plaintiff expressed her willingness that they should do so, and offered them a bond to make them a title, provided she succeeded in recovering from Kelly the increased amount which they had paid him. This they declined to receive, preferring to rely on Kelly's warranty.

The plaintiff alleges in her bill, and in an amended bill, that the defendants, the Dixons, had express notice of her claim at the time of their purchase, but that, at any rate, her residing on the land, and the pendency of the action of ejectment in the court of law, amounted to constructive notice. And, in a second amended bill, she alleges that Thomas Dixon and Woody had express notice at the time of their purchase from the Dixons.

The prayer is for an injunction to stay the proceedings in the court of law, also for a conveyance of the land upon the payment of the purchase money, and for general relief.

The defendant Kelly, in his answer, relied upon the unreasonable delay of the plaintiff in paying the purchase money, upon her abandonment of the contract, and upon the impossibility of specific performance because of his *bona fide* conveyance to the Dixons. The Dixons denied notice of the plaintiff's equity at the time of their purchase. Woody and Thomas Dixon endeavored to shelter themselves under the Dixons.[1]

Pearson, J. The defendant Kelly avers that, before the bill was filed, he had sold and conveyed the land, for a valuable consideration, to the other defendants, and so a specific performance by him is impracticable. Admitting this allegation, the plaintiff insists that, if she is not able to get the land from the other defendants, who are made parties by the amended bills, on the ground that they had notice of her equity, then she is at liberty, under the general prayer for a relief, to fall back upon her secondary equity, and by ratifying the sale, charge the defendant Kelly with the price he received for the land, deducting the amount of the purchase money, with its interest, that is still due on her contract.

It is held in Scarlett *v.* Hunter,[2] and is, in fact, a familiar principle, that where there is a contract for the sale of land, the vendee is considered in equity as the owner, and the vendor retains the title as a security for the purchase money. So, the effect of the contract was, that the defendant held the land as trustee to secure the balance of the purchase money, and then in trust for the plaintiff. This brings the case within another familiar principle: that where a trustee converts the fund, the *cestui que use* has a right to follow the fund and take it in its changed shape; as, where a guardian invests the ward's money in the purchase of land, the ward may elect to have the land; so here, we can see no reason why the *cestui que use* may not, if she chooses, have the price which was realized by a sale of the land. What right has the trustee to say that he should be allowed to retain the profit made by his sale? It was a breach of trust. Can he take advantage of his own wrong, and ask a court of equity to drive the injured *cestui que use* to her action at law, for damages on the contract?

In Cheshire *v.* Cheshire,[3] one entitled to slaves, after a life estate (the slaves having been run out of the State and sold by the particular tenant), was allowed to elect to take the fund in its changed form; that is, the money for which the slaves had been sold.

In Daniels *v.* Davison,[4] where a seller, after a contract for sale, sold at an advanced price to another person, the bill filed by the first purchaser prayed that, if the second purchaser bought without notice, so that the land could not be reached, the seller might account

[1] The statement of the case is abridged and a portion of the opinion of the court is omitted. — Ed.

[2] 3 Jones, Eq. 84. [3] 2 Ired. Eq. 569. [4] 16 Ves. 249.

to the plaintiff for the advanced price. It was not necessary to decide the point, but Lord Eldon seems to have had no doubt about this secondary equity of the plaintiff. Such was clearly the opinion of Sir Edward Sugden. See 1 Sugden on Vendors, &c., 277. In fact, "the reason of the thing" is so clear that no authority is necessary to establish it.

There will be a decree for plaintiff, and a reference to ascertain the amount of the price received by Kelly, and the balance of the purchase money with its interest still due by plaintiff, so as to fix the sum to which the plaintiff is entitled.

PER CURIAM. *Decree accordingly.*[1]

MINARD *v.* BEANS.

SUPREME COURT, PENNSYLVANIA, APRIL 4, 1870.

[64 *Pennsylvania Reports*, 411.]

THE action was for interest under the following articles of agreement: "Articles of agreement made this 9th day of March, 1868, between Robert Beans of the one part, and Orlando W. Minard of the other part, showeth that the said Robert Beans doth hereby agree to sell and convey all the real estate belonging to him, situated, &c., also all the tools, steam-engine boilers, also all the patterns, flasks, &c., in consideration thereof the said Orlando W. Minard hereby agrees to pay, or cause to be paid, the sum of $25,000, the payments to be as follows: $1000 upon the signing of this agreement, $5000 on or before the 1st of April next, $4000 on or before the 1st of October next, the balance to remain on mortgage and payable in five equal instalments of $3000, the first one due October 1st, 1869, the second one October 1st, 1870, to continue until all are paid, together with interest on all moneys remaining unpaid," &c.

The defendant took possession of the premises and property on the 1st of April, 1868.

The deed was dated April 1st, 1868, but acknowledged and delivered on the 1st of October, 1868, at which time a mortgage was given for $15,000, to secure the payments as per article of agreement, with interest from its date, without prejudice to either party upon the questions in this case stated. The payments made were $1000 at the execution of the articles of agreement, $5000 on the 1st of April, 1868, and $4000 on the 1st of October, 1868; no interest having been paid on any of said sums of money.

[1] Daniels *v.* Davison, 16 Ves. 249 (*semble*); Haughwout *v.* Murphy, 22 N. J. Eq. 531, 547; Sugg *v.* Stowe, 5 Jones, Eq. 126; Siter's App., 26 Pa. 178; Frick's App., 101 Pa. 485; Batz *v.* Paff, 95 Wis. 95 *Accord*.

On the same principle, a vendor who wrongfully severs and sells a portion of the realty covered by the contract is accountable for what he has received therefor, although it may exceed greatly the amount of the depreciation in the value of the land. Worrall *v.* Munn, 53 N. Y. 185. — ED.

The question for the opinion of the court, is, whether the plaintiff is entitled to interest from April 1st, 1868, the day of taking possession of the said premises by defendant, to October 1st, 1868, the day of the delivery of the deed and mortgage, on the $19,000 remaining unpaid during that time.

The court (Chapman, P. J.) rendered judgment for the plaintiff for $570.[1]

THOMPSON, C. J. We think the true interpretation of the agreement set forth in the case stated, leads to a different result from that arrived at in the court below.

It is morally certain that nothing was expected to remain unpaid on the 1st of October, 1868, but the money which was to remain on mortgage, and that was to be paid in five instalments of $3000 each, "together with interest on the moneys so remaining unpaid on the said 1st of October, 1868." That the interest was to commence then is certain, for that was the time the mortgage was to be given; and this is reduced to a certainty by the fact that the instalments were to fall due annually and be payable on the "1st day of October, 1869; the second on the 1st day of October, 1870; and so on," &c. The mortgage was given on the 1st of October, 1868, for the security of the above-mentioned instalments, which shows that all prior payments had been made. There was no contract to pay interest on any money falling due on the 1st of October, 1868, and there was none to pay interest on the money to be secured at that date. If interest was to be calculated, and paid, before giving the mortgage on the payments to be secured by it, where is the contract for that? If it be claimed that it was to be calculated and included in the mortgage, it will conflict with the agreement which makes all the instalments to be secured by the mortgage equal. They would be unequal by the amount of back interest. If it be claimed that the mortgage was to be given on the 1st of April 1868, then as the agreement fixes that the instalments are to be paid annually, and expressly fixes the time of payment, just a year from the 1st of October, 1868, viz.: 1st of October, 1869, and so on, the first instalment would not be annual. It would be payable a year and a half after being secured, and thus conflict with the agreement. This shows that the parties did not mean this, but that the payments were to be annual, the first having a year to run, the second two years, and so on from year to year, and until they should be paid.

Interest, as a general, I might say, universal rule, is never demandable until money is due. "It is," say the books, "compensation allowed to the creditor for delay of payment by the debtor."

It is completely due, wherever a liquidated sum of money is unjustly withheld. It is a legal and uniform rate of damages allowed, in the absence of any express contract, when payment is withheld, after it has become the duty of the debtor to discharge the debt: Kelsey *v.* Murphy.[2] There was no express contract for the payment of in-

[1] The statement of the case, and the arguments of counsel, as well as a small part of the opinion, are omitted. — ED.

[2] 6 Casey, 340.

terest up to the 1st of October, 1868. That is certain. Where is the principle that implies it? There was no debt due at that time bearing interest, and no overdue debt existed. It was a mistake to imply it from possession of the property by the vendee, when no money was due or withheld.

There is a class of cases where interest is always charged on money due, although not payable, by a vendee. For instance, where the purchase money is payable at a certain time, and the deed is to be made at the same time. If the vendor cannot make title at the time appointed for the payment of the purchase money, and the vendee retains possession, he must pay interest as a compensation for the profits he is receiving during the vendor's inability to make title.[1] It would be

[1] Calcraft *v.* Roebuck, 1 Ves. Jr. 221; Dyer *v.* Hargrave, 10 Ves. 505; Fludyer *v.* Cocker, 12 Ves. 25; Roberts *v.* Massey, 13 Ves. 561 (*semble*); Att'y-Gen. *v.* Christ Church, 13 Sim. 214; Birch *v.* Joy, 3 H. L. C. 565; Regent's Co. *v.* Ware, 23 Beav. 575; Leggott *v.* Metrop. Co., 5 Ch. 716; Kershaw *v.* Kershaw, 9 Eq. 56; Rhys *v.* Dare Co., 19 Eq. 93; Ballard *v.* Shutt, 15 Ch. D. 122; *In re* Shaw, 27 Ch. D. 614; Phillips *v.* South Park, 119 Ill. 626; Atchison Co. *v.* Chicago Co., 162 Ill. 632; Breckenridge *v.* Hoke, 4 Bibb, 272; Boyce *v.* Pritchett, 6 Dana, 231; Baxter *v.* Brand, 6 Dana, 296; Sanders *v.* Boyer, 152 Mass. 141; Ashmore *v.* Evans, 11 N. J. Eq. 152; Lang *v.* Moole, 31 N. J. 413; Simonds *v.* Essex Co., 57 N. J. Eq. 349 (explaining Ware *v.* Lippincott, 45 N. J. Eq. 220); Stevenson *v.* Maxwell, 2 N. Y. 408; Viele *v.* Troy Co., 21 Barb. 381; Cleveland *v.* Burrill, 25 Barb. 533; McKay *v.* Melvin, 1 Ired. Eq. 73; Sievers *v.* Brown, 34 Oreg. 454; Railroad *v.* Gessner, 20 Pa. 240; Delaware Co. *v.* Burson, 61 Pa. 369; Ramsay *v.* Brailsford, 2 Dess. 582; Boyle *v.* Rowand, 3 Dess. 555; Rutledge *v.* Smith, 1 McC. Ch. 399; Selden *v.* James, 6 Rand. 464; Brockenbrough *v.* Blythe, 3 Leigh, 619; Steenrod *v.* R. R. Co., 27 W. Va. 1 *Accord.*

The vendee must also pay interest from the day of payment, although not in possession of the property purchased, if he obtains a decree against the seller for the rents and profits or an occupation rent from that date. Eastman *v.* Simpson, 139 Mass. 348; Covell *v.* Cole, 16 Mich. 223; Bostwick *v.* Beach, 105 N. Y. 661; Hundley *v.* Lyons, 5 Munf. 342; see also Acland *v.* Cuming, 2 Madd. 25.

Appropriation of the Purchase Money for the Benefit of the Seller. — The buyer may relieve himself from the burden of paying interest by a definitive appropriation of the principal and notice to the seller that it is so set aside for his benefit. Howland *v.* Norris, 1 Cox, Eq. 59; Powell *v.* Martyr, 8 Ves. 146 (*semble*); Roberts *v.* Massey, 13 Ves. 561; Dyson *v.* Hornby, 4 De G. & Sm., 481; Regent's Co. *v.* Ware, 23 Beav. 575; Kershaw *v.* Kershaw, 9 Eq. 56; Sanders *v.* Boyer, 152 Mass. 141, 144 (*semble*); Bostwick *v.* Beach, 103 N. Y. 414, 105 N. Y. 661; Rutledge *v.* Smith, 1 McC. Ch. 399, 404 (*semble*); Riley *v.* McNamara, 83 Tex. 11; Selden *v.* James, 6 Rand. 464, 489 (*semble*); Steenrod *v.* R. R. Co., 27 W. Va. 1, 15 (*semble*).

Seller in Possession and in Default. — If the seller retains possession and is not able to convey at the appointed time, he cannot collect interest of the buyer, except from the time when he is in a position to make a good title. He must content himself with the rents and profits of the property, which are usually less than the interest. Blount *v.* Blount, 3 Atk. 636, 637; Paton *v.* Rogers, 6 Madd. 256 (*semble*); Binks *v.* Rokeby, 2 Sw. 222; Esdaile *v.* Stephenson, 1 S. & S. 122 (*semble*); Mudd *v.* Huskisson, 4 Russ. 121, n.; Jones *v.* Mudd, 4 Russ. 118; Boehm *v.* Wood, 1 L. J. Ch., o. s. 234; Denning *v.* Henderson, 1 De G. & Sm. 689; DeVisme *v.* DeVisme, 1 Mac. & G. 336, 1 H. & Tw. 408 s. c.; Carrodus *v.* Sharp, 20 Beav. 56; Wells *v.* Maxwell, 32 Beav. 550; *In re* Pigott, 18 Ch. D. 146 (discrediting *Re* Eccleshill, 13 Ch. D. 365); Johnston *v.* Johnston, Ir. R. 3 Eq. 328; Lombard *v.* Chicago Co., 64 Ill. 477, 75 Ill. 271; Hart *v.* Brand, 1 A. K. Marsh. 159; Ruckman *v.* King, 24 N. J. Eq. 557; Dias *v.* Glover, Hoff. Ch. 71; Worrall *v.* Munn, 38 N. Y. 137, 53 N. Y. 185.

Should the rents and profits exceed the interest, it is believed that the buyer would have the right to pay interest and claim the rents and profits. Powell *v.* Martyr, 8 Ves. 146; Esdaile *v.* Stephenson, 1 S. & S. 122.

It is a common practice in England to provide that interest shall be payable from the day fixed for payment of the purchase money if from any cause whatever, except the wilful neglect or default of the vendor, the completion of the purchase shall be delayed beyond the appointed day. In such cases the buyer pays interest, and is entitled to the rents

grossly inequitable that the vendee should hold both land and money and compensate for neither. These and kindred circumstances raise an obligation to pay interest, although the purchase money is not recoverable. But even here the money must be overdue. Where it is not due, and no contract exists for its payment while running to maturity, it must be an exceptional case where it is legally demandable. It is certainly not so, we think, in this case. We think, therefore, that there was error in the court below in entering judgment in favor of the plaintiff below, and that the judgment must be reversed.[1]

LUMSDEN *v.* FRASER.

In Chancery, before Sir L. Shadwell, V. C., June 25, 1841.

[12 *Simons*, 263.]

A contract was entered into for the sale of an estate, which was to be completed at a future time. Before that time arrived the vendor died intestate as to the estate agreed to be sold. On his death his heir entered into the receipt of the rents of the estate, and continued to receive them until the time for completing the contract arrived. The question was whether he was entitled to retain the rents which he had received or ought to account for them to the vendor's personal representative.

The Vice-Chancellor. If a contract for the sale of an estate is to be performed at a future time, and, before that time arrives, the vendor dies, the law casts the whole legal estate upon his heir in the mean time; and if, by virtue of the interest which so devolves upon him, he receives the rents of the property until the time for performance of the agreement arrives, the question is, whether any equity then arises

and profits. Esdaile *v.* Stephenson, 1 S. & S. 122; Greenwood *v.* Churchill, 8 Beav. 413; Sherwin *v.* Shakspear, 5 D. M. & G. 517; Bannerman *v.* Clark, 3 Drew 632; Vickers *v.* Hand, 26 Beav. 386; Palmerston *v.* Turner, 33 Beav. 524; *Re* Gold's Contract, 33 W. R. 333; *Re* Riley, 34 Ch. D. 386; Royal Society *v.* Bomash, 35 Ch. D. 390; *Re* London Corp., 1894, 2 Ch. 524.

The following cases *contra* may be regarded as superseded: Monk *v.* Huskisson, 4 Russ. 121, n.; Birch *v.* Podmore, Sugd. V. & P. (14th ed.) 635; DeVisme *v.* DeVisme, 1 Mac. & G. 336 (reversing s. c. 13 Jur. 205); Robertson *v.* Skelton, 12 Beav. 363 (see also Rowley *v.* Adams, 12 Beav. 476 and Coope *v.* Bakewell, 13 Beav. 421; and compare Tewart *v.* Lamson, 3 De G. & Sm. 307).

Buyers, who are bound to pay interest under the provision mentioned in the sixth paragraph of this note cannot avoid the payment by appropriating the principal for the benefit of the seller and notifying him thereof. Vickers *v.* Hand, 26 Beav. 630; *Re* Riley, 34 Ch. D. 386 (declining to follow *Re* Gold's Contract, 33 W. R. 333, and the *dictum* in Williams *v.* Glenton, 1 Ch. Ap. 200, 206, and distinguishing *Re* Monckton, 27 Ch. D. 555).

Instances of wilful default may be found in *Re* Young, 31 Ch. D. 168; *Re* Wilson, 1894, 3 Ch. 541; Strafford *v.* Maples, 1896, 1 Ch. 235; Hayes *v.* Elmsley, 23 Can. S. C. 623. — Ed.

[1] Nicholson *v.* Nicholson, 5 L. J. Ch. N. S. 51; Birch *v.* Joy, 3 H. L. C. 565; Lofland *v.* Maull, 1 Del. Ch. 359; Atchison Co. *v.* Chicago Co., 162 Ill. 632; Lang *v.* Moole, 31 N. J. Eq. 413; McKay *v.* Melvin, 1 Ired. Eq. 73 *Accord.* — Ed.

to the personal representative of the vendor, which entitles him to what the heir has received?

The law favors the heir rather than the executor: and my opinion is that what the heir has received he is entitled to keep.[1]

CROCKFORD *v.* ALEXANDER.

IN CHANCERY, BEFORE LORD ELDON, C., JUNE 23, 1808.

[15 *Vesey*, 138.]

THE plaintiff having contracted to sell an estate to the defendant, the latter obtained possession from the tenant; and began to cut timber; upon which the bill was filed, and a motion made, for an injunction.

Mr. *Cullen*, in support of the motion, observed, that this was a case of trespass.

THE LORD CHANCELLOR. Although at law this defendant is a trespasser, he is in equity by the effect of the contract the owner of this estate; having taken possession under the contract; and the vendor is in the situation of an equitable mortgagee. This court has occasionally granted an injunction in cases of trespass as well as waste; and having thought much upon this subject, I will grant this protection against cutting timber; until the power of the court to grant the injunction against trespass shall be fully discussed. Lord Thurlow refused the injunction in this case: a man, possessed of two fields, demised one, with the mines under it; the lessee found his way, working under ground, to the mines under the other field, which was not demised; Lord Thurlow held that to be trespass, not waste; and did not grant the injunction. There are, however, several cases, furnishing

[1] Shadforth *v.* Temple, 10 Sim. 184 *Accord.*

By the same principle, if a testator, after making a will devising certain leasehold houses to A and the residue of his estate to B, contracts to sell the leasehold houses, and dies, A, though unable to keep the leaseholds, is entitled to the rents accruing after the testator's death and before the completion of the purchase. Watts *v.* Watts, 17 Eq. 217.

From the time appointed for completion, the vendor remaining in possession is answerable to the buyer for rents and profits received or for an occupation rent if he receive no rents or profits. Burton *v.* Todd, 1 Sw. 255; Dyer *v.* Hargrave, 10 Ves. 144; Fenton *v.* Brown, 14 Ves. 144; Acland *v.* Cuming, 2 Madd. 28 (vendor liable for occupation rent); Regent's Co. *v* Ware, 23 Beav. 575; Phillips *v.* Sylvester, 8 Ch. 173; Metrop. Co. *v.* Defries, 2 Q. B. Div. 387, 2 Q. B. D. 189; Heinlen *v.* Martin, 53 Cal. 321 (vendor liable for occupation rent); Swain *v.* Burnette, 76 Cal. 299; Lombard Co. *v.* Chicago Co., 75 Ill. 271; Mason *v.* Chambers, 3 Mon. 318; Baxter *v.* Brand, 6 Dana, 296; Eastman *v.* Simpson, 139 Mass. 348; Craig *v.* Greenwood, 24 Neb. 557; Worrall *v.* Munn, 38 N. Y. 137 (vendor liable for occupation rent equal to interest on purchase money); Hampton *v.* Snipes, 1 Dess. 125.

A vendor resuming possession is chargeable with rents and profits. Ashurst *v.* Peck, 101 Ala. 499, 108 Ala. 429; Loventhal *v.* Home Co., 112 Ala. 108, 113 (*semble*); Cole *v.* Tyson, 8 Ired. Eq. 170.

In Leggott *v.* Metrop. Co., 5 Ch. 714, the buyer, being in default, was not allowed to charge the seller with an occupation rent, since the seller remained in possession at great inconvenience to his business. — ED.

principles by analogy. In Lord Byron's case,[1] it was destruction, not waste: there being no privity between Lord Byron and the persons who had the mills. There is no difference between destruction and trespass, where there is no privity of estate; and at law the writ of *estrepement* may be had to prevent repetition of waste. I have therefore ventured to grant an injunction in trespass; and this defendant will find it very difficult to maintain that he can use his legal character of trespasser, in order to enable himself to commit what is absolute destruction.

The order for the injunction was made.[2]

CLARKE *v.* RAMUZ.

Court of Appeal, July 7, 1891.

[*Law Reports*, 1891, 2 *Queen's Bench*, 456.]

Action by the purchaser of land against the vendor for wrongfully, and in breach of his duty to the plaintiff under the contract for sale of the land, suffering one Jackson to remove from the said land some hundreds of cartloads of soil.

At the trial before Grantham, J., with a jury, the facts appeared to be as follows: On August 2, 1889, the defendant entered into a contract for the sale to the plaintiff for 255*l.* of the fee simple of five small plots of building land situate at Southend. The property in question formed part of various lots sold by auction under the same conditions of sale. The date fixed by the contract for completion was August 12, 1889. By the conditions of sale it was provided that a purchaser who required a free conveyance, as thereinafter provided, should not be entitled to an abstract of title except on payment of a specified fee; and it was further provided that the contents and dimensions of the property as stated in the particulars should be

[1] Bro. C. C. 588.

[2] Rawlins *v.* Burgis, 2 V. & B. 382, 389; Moses *v.* Johnson, 88 Ala. 517; Gravlee *v.* Williams, 112 Ala. 539, 544 (*semble*); Miller *v.* Waddingham, 91 Cal. 377 (*semble* — security not endangered) Stowell *v.* Waddingham, 100 Cal. 7 (*semble* — bill filed too late); Small *v.* Slocumb, 112 Ga. 279 (*semble* — security not endangered); Smith *v.* Moore, 26 Ill. 392 (correcting decision in s. c. 24 Ill. 512); Baldwin *v.* Pool, 74 Ill. 97 (*semble* — security not endangered); McCaslin *v.* State, 44 Ind. 151; Jennison *v.* Stone, 33 Mich. 99; Scott *v.* Wharton, 2 Hen. & M. 25 (*semble* — security not endangered) *Accord*.

In Moses *v.* Johnson, *supra*, Stone, C. J., delivering the opinion of the court, said: "We feel safe in holding, that the owner who sells on credit, retaining the title as security for the purchase money, sustains the same relation to the vendee, so far as the question of security is concerned, as does the mortgagee to the mortgagor. In King *v.* Smith, 2 Hare, 239, it was said to be an established rule, 'that if the security of the mortgagee is insufficient, and the court is satisfied of that fact, the mortgagor will not be allowed to do that which would directly impair the security — cut timber upon the mortgaged premises.' This court is fully committed to the same doctrine. In Coker *v.* Whitlock, 64 Ala. 180, this court ruled that when the mortgagor is committing waste which impairs the security, or renders it insufficient, chancery, at the suit of the mortgagee, will restrain him by injunction." — Ed.

taken to be correct, and no compensation should be required for any excess or deficiency in any of the quantities stated, and that no misdescription should annul the sale, nor should any compensation be allowed in respect thereof. On August 17 the defendant's solicitors wrote to the plaintiff reminding him that August 12 was the time fixed for completion, and asking him to name an early day for completion. On September 10 they again wrote reminding him that August 12 was the day for completion. On September 11 the plaintiff answered, asking for a free conveyance. On October 21, 1889, a conveyance of the land to the plaintiff was executed by the defendant, and the plaintiff then paid the balance of the purchase money.

The defendant remained in possession of the land sold till completion. The defendant had employed one Jackson to make roads on his property adjoining the land sold to the plaintiff. Jackson, between September 11 and 30, 1889, without the knowledge of or any authority from the defendant, who lived at Herne Bay on the other side of the Thames, removed a large quantity of surface soil from the plots of land sold to the plaintiff, for the purpose of filling up a hole in a road being made by him on the defendant's land. At the time when completion took place neither the plaintiff nor defendant knew that this had been done. The plaintiff did not find out that the soil had been removed till August or September, 1890. He then commenced the action. It seemed to have been assumed at the trial that the question was one of law for the judge, except so far as the amount of damages was concerned. The jury accordingly assessed the damages, and the judge gave judgment for the plaintiff for the amount found by them.

The defendant now moved for judgment or for a new trial, on the ground that the judge's ruling was erroneous.[1]

Lord Coleridge, C. J. The contention is that such an action as this will not lie. It appears to be well established in equity that, in the case of a contract for the sale and purchase of land, although the legal property does not pass until the execution of the conveyance, during the interval prior to completion the vendor in possession is a trustee for the purchaser, and as such has duties to perform towards him, not exactly the same as in the case of other trustees, but certain duties, one of which is to use reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, as it was when the contract was made. Of course, where from any cause a long period of time elapses during which such possession of the vendor continues and deterioration of the property takes place, other considerations may come in; but in this case the injury complained of is the removal of a considerable portion of the soil for purposes for which the vendor had no right to allow such removal without the consent of the purchaser. The case of Phillips *v.* Silvester[2] is stated

[1] The arguments and the concurring judgment of Bowen, L. J., and a portion of the judgment of Kay, L. J., are omitted. — Ed.

[2] Law Rep. 8 Ch. 173.

by Mr. Dart to have been commented upon by Jessel, M. R.; but the doctrine that the vendor in possession is under such circumstances a trustee for the purchaser appears to have been entirely acquiesced in by him in the subsequent case of Earl of Egmont *v.* Smith.[1] Phillips *v.* Silvester[2] is a decision with which we not only agree, but which is binding upon us. It lays down in clear terms under circumstances hardly distinguishable from those which exist in the present case, that there is such a duty as I have mentioned incumbent upon a vendor in possession after a contract for sale. If there is such a duty, it is clear in the present case that there has been a breach of it, because no care has been taken by the vendor to keep the property in the state in which it was when the contract was made. The counsel for the defendant were driven to contend that no care was under the circumstances reasonable care, a position which cannot possibly be supported. Then it was contended that by reason of the execution of the conveyance there was an end of any remedy for the breach of trust which had taken place, and which had lessened the value of the land. I could understand that, where the purchaser knew what had happened, it might possibly be argued that, by reason of his taking a conveyance without making any claim in respect of the breach of trust, there was evidence of a waiver by him of his right; but where, as in this case, neither party, at the time when the conveyance was executed, knew anything about what had happened, I cannot see any ground whatever for the suggestion that the execution of the conveyance had the effect contended for by the defendant. It appears to me clear on principle, and upon the authority of the decision in Phillips *v.* Silvester, followed, as it has been, by Jessel, M. R., in Earl of Egmont *v.* Smith, and by Kekewich, J., in Royal Bristol Permanent Building Society *v.* Bomash,[3] that this action is maintainable; and that, therefore, this application must be dismissed.

Kay, L. J. I agree. The cases of Phillips *v.* Silvester and Earl of Egmont *v.* Smith clearly establish the proposition that for some purposes the vendor in possession after a contract for sale of land is in the position of a trustee for the purchaser. He has certain duties towards the purchaser, one of which is — I am only putting into my own words what the decided cases have established — to take reasonable care that the property is not deteriorated in the interval before completion and while it is in his possession as such trustee. Here no such care was taken; and, therefore, there was a breach of the duty owed by the vendor to the purchaser. Another point argued was that this removal of soil happened after the time fixed for completion, and that there was a difference as regards the duty of the vendor towards the purchaser between the time before and that after the date fixed for completion. Certain dicta were referred to for the purpose of showing this. But this was a contract under which it was plainly not the intention of either party that the pur-

[1] 6 Ch. D. 469. [2] Law Rep. 8 Ch. 173. [3] 35 Ch. D. 390.

chaser should have possession until completion took place and the purchase money was paid. It is rare for a contract for sale of land to give the purchaser a right to possession before completion; and, whenever that is intended, it is always expressed most explicitly. There is nothing in the terms of this contract which would give a right to possession before completion and payment of the purchase money. Under these circumstances, it seems to me that there is no difference in this case, so far as the duty of the vendor is concerned, between the time before and the time after the date fixed for completion; and that his duty was as described until the purchase was completed. For these reasons, it appears to me that the action is maintainable.

Application refused.[1]

H. W. BUTTON *v.* J. J. SCHROYER.

Supreme Court, Wisconsin, December Term, 1856.

[5 *Wisconsin Reports*, 598.]

The complainant entered into a written contract with the defendant for the sale of a certain tract of land. A part of the purchase money was paid down, the remainder to be paid in instalments, and when fully paid, a conveyance of the title in fee simple to be made. Some of the instalments of purchase money remained unpaid after they had become due and payable by the terms of the contract (the vendee being in possession), and the vendor filed his bill to foreclose or extinguish the equity of redemption of the vendee. The circuit court made the usual decree of foreclosure and sale, as in case of mortgage, and the defendant appealed.

Per Curiam. This is an ordinary case of a contract for the sale and conveyance of real estate, part of the purchase money having been paid and possession taken, and the title withheld as security for the remainder of the purchase money. There is no doubt but that a court of equity has jurisdiction in such cases, as well to relieve the vendor as the vendee upon failure to comply. The relation between the parties is analogous to that of equitable mortgagor and mortgagee. The former has an equity of redemption, the latter has the cor-

1 Foster *v.* Deacon, 3 Madd. 394; Dowson *v.* Solomon, 1 Dr. & Sm. 1, 10; Regent's Co. *v.* Ware, 23 Beav. 575; Phillips *v.* Silvester, 8 Ch. 173; Lysaght *v.* Edwards, 2 Ch. D. 499, 507; Egmont *v.* Smith, 6 Ch. D. 469 (vendor liable for not reletting farms); Royal Co. *v.* Bomash, 35 Ch. D. 390; Newman *v.* Maxwell, 80 L. T. Rep. 681; Malone *v.* Henshaw, L. R. 29 Ir. 352; Worrall *v.* Munn, 38 N. Y. 137, 149, 53 N. Y. 185, 190; Bostwick *v.* Beach, 105 N. Y. 661 (but see Hellreigel *v.* Manning, 97 N. Y. 56) *Accord.*

See Weakland *v.* Hoffman, 50 Pa. 513.

A fortiori the seller may be restrained by injunction from committing active waste. Holmberg *v.* Johnson, 45 Kan. 197. 31 Pac. 470

But for any deterioration subsequent to the time when the buyer ought to have taken possession, he alone is responsible. Binks *v.* Rokeby, 1 Sw. 222; Minchin *v.* Nance, 4 Beav. 332; Carrodus *v.* Sharp, 20 Beav. 56. — Ed.

relative right of foreclosure. A court of equity will relieve against forfeiture from non-compliance on the part of the vendee, but will enforce performance within a reasonable time.

But as the title did not pass by the contract, but remained in the vendor, we think the decree of sale erroneous. The proper decree in such cases is, that the money due upon the contract be paid within such reasonable time as the court may direct, or that the vendee be foreclosed of his equity of redemption.

Decree reversed and cause remanded.[1]

WHITE *v.* NUTT.

In Chancery, before Sir N. Wright, K., Michaelmas Term, 1702.

[1 *Peere Williams*, 61.]

One by articles, reciting that he had an estate for two lives in a church lease, covenanted to convey his title to the premises by such a day to J. S. as J. S. or his counsel should advise.

It happened, that after the articles, and before the time appointed for the conveyance, one of the lives dropt. And the question being upon whom the loss should fall,

It was decreed per Lord Keeper: that in regard here was no de-

[1] Baker *v.* Beach, 15 Wis. 99; Kimball *v.* Darling, 32 Wis. 675; Landon *v.* Bank, 36 Wis. 378; Church *v.* Smith, 39 Wis. 492; Superior Co. *v.* Nichols, 81 Wis. 656; Nelson *v.* Jacobs, 99 Wis. 547 *Accord.*

But generally in this country the decree is not for a strict foreclosure, but for a foreclosure by a sale of the property. Raymond *v.* San Gabriel Co., 53 F. R. 883; Haley *v.* Bennett, 5 Port. 452; Chapman *v.* Chunn, 5 Ala. 397; Kelly *v.* Payne, 18 Ala. 371; Hester *v.* Hunnicutt, 104 Ala. 282; Lewis *v.* Boskins, 27 Ark. 61; Garrett *v.* Williams, 31 Ark. 240; McConnell *v.* Beattie, 34 Ark. 113; Martin *v.* O'Bannon, 35 Ark. 62; Sparks *v.* Hess, 15 Cal. 186; Keller *v.* Lewis, 53 Cal. 113 (but strict foreclosure was permitted in Fairchild *v.* Mullan, 90 Cal. 190; Southern Co. *v.* Allen, 112 Cal. 455; Odd Fellows Bank, 124 Cal. 255); Andrews *v.* Sullivan, 7 Ill. 327; Burger *v.* Potter, 32 Ill. 66; Vail *v.* Drexel, 9 Ill. Ap. 439; Lagon *v.* Badollet, 1 Blackf. 416; Brumfield *v.* Palmer, 7 Blackf. 227; Amory *v.* Reilly, 9 Ind. 490; McCaslin *v.* State, 44 Ind. 151, 99 Ind. 428; Hamilton *v.* Plant, 81 Ind. 417, 425; Huffman *v.* Canble, 86 Ind. 591; Meagher *v.* Hoyle, 173 Mass. 577; Denton *v.* Scull, 26 Minn. 325 (strict foreclosure — but sale allowed if more equitable); Abbott *v.* Moldestad, 74 Minn. 293; Fitzhugh *v.* Maxwell, 34 Mich. 134; Walker *v.* Cosgrain, 101 Mich. 604; Gray *v.* Hill, 105 Mich. 189; Loveridge *v.* Shuntz, 111 Mich. 618; Gaslin *v.* White, 46 Mo. 486; Lewis *v.* Chapman, 59 Mo. 371; Gardels *v.* Kloke, 36 Neb. 493, 52 Neb. 117; Hendrix *v.* Barker, 49 Neb. 369; Brown *v.* Norcross, 59 N. J. Eq. 427; Champion *v.* Brown, 6 Johns. Ch. 398; Clark *v.* Hall, 7 Paige, 382 (strict foreclosure allowed in State *v.* Sheridan, Clarke, Ch. 533); Freeson *v.* Bissell, 63 N. Y. 168; Thomson *v.* Smith, 63 N. Y. 301 (*semble*); Allen *v.* Taylor, 96 N. Ca. 37, 41; Battery Bank *v.* Loughran, 122 N. Ca. 668; Whitmire *v.* Bond, 53 S. Ca. 315; Brace *v.* Dobb, 3 S. Dak. 110; Johnson *v.* Kurtz, 97 Tenn. 503; Mullens *v.* Big Creek (Tenn. 1895). 35 S. W. R. 439; Wade *v.* Greenwood, 2 Rob. Va. 474; Yancey *v.* Mauck, 15 Grat. 300.

It is sometimes provided that the vendor shall have a power of sale similar to that of the mortgagee in a power of sale mortgage. Battery Bank *v.* Loughran, 122 N. Ca. 668.

As in the case of a foreclosure of a mortgage, a vendor may have a receiver appointed to collect rents and profits, if the land is not worth the amount of the unpaid purchase money and the buyer is insolvent. Hughes *v.* Hatchett, 55 Ala. 631. — Ed.

fault in the seller in making the conveyance, the loss of the life ought to be borne by the purchaser, in the same manner as if the reversioner had articled to sell the reversion expectant upon two lives, and one of them had died before the conveyance, the purchaser should there have had the benefit of it; and in each case, in equity, the estate is as conveyed from the time of the articles sealed.[1]

But his Lordship seemed to think, that if *all* the lives had dropt before the execution of the conveyance, it might have been another consideration, for that the money was to be paid upon the conveyance, and no estate being left, there could be no conveyance.[2]

PAINE *v.* MELLER.

In Chancery, before Lord Eldon, C., July 22, 1801.

[6 *Vesey*, 349.]

Upon the 1st of September, 1796, the plaintiffs sold to the defendant by auction some houses in Ratcliffe Highway, upon the usual terms, a deposit of 25*l.* per cent. and a proper conveyance to be executed upon payment of the remainder of the purchase money at Michaelmas next. An abstract was delivered to the defendant at the end of September. On the 4th or 5th of November the defendant's solicitor sent a draft for a conveyance. The draft was returned to the defendant's solicitor; the deeds were engrossed; and upon the 16th or 17th of December he declared himself satisfied with the title; and said the deeds would be ready in two or three days. Upon the 18th of December the houses were burnt; the insurance having been suffered to expire at Michaelmas, 1796.

The bill was then filed; praying a specific performance of the contract.[3]

Lord Chancellor. First, it is said, the title was never accepted in fact: secondly, if not, under these circumstances a court of equity will not compel a specific performance. As to the second point the objection is grounded upon two circumstances: First, the simple fact

[1] Mortimer *v.* Copper, 1 Bro. C. C. 156; Jackson *v.* Lever, 3 Bro. C. C. 605; Coles *v.* Trecothick, 9 Ves. 234, 246; Rawlins *v.* Burgis, 2 V. & B. 382, 387; Harford *v.* Purrier, 1 Madd. 534, 539; Revell *v.* Hussey, 2 Ba. & Be. 280, 287 *Accord.* — Ed.

[2] But in Kenney *v.* Wexhan, 6 Madd. 355, the buyer was compelled to pay although the only life dropped before the execution of the conveyance. Sir John Leach, V. C., said: The vendor agrees to sell for a contingent price, and those who represent him cannot complain that the contingency has turned out unfavorably. The same principle necessarily applies to a case where the life annuity is not the price, but is the subject of the sale. If the annuitant happens to die before the annuity is legally transferred to the purchaser, the death of the annuitant can form no objection to the specific performance of the contract. The purchaser agrees to buy an interest of uncertain duration, and he cannot complain that the contingency is unfavorable to him. — Ed.

[3] The statement of the case is condensed, and the arguments of counsel, as well as a portion of the judgment of the court, are omitted. — Ed.

of the fire; secondly, that the premises had been insured prior to the contract; that that fact and the fact that the insurance expired at Michaelmas, 1796, were not disclosed; and that the premises afterwards remained uncovered by any insurance. The authority of Sir Joseph Jekyll has been mentioned: but no case has been cited in support of that dictum;[1] and it is in a degree suggested, not admitted at the bar, that it may be considered overruled by subsequent cases. As to the mere effect of the accident itself no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heir. If a man had signed a contract for a house upon that land, which is now appropriated to the London Docks, and that house was burnt, it would be impossible to say to the purchaser, willing to take the land without the house, because much more valuable on account of this project, that he should not have it. As to the annuity cases and all the others, the true answer has been given; that the party has the thing he bought; though no payment may have been made; for he bought subject to contingency. If it is a real estate, he of course has it. Then as to the non-communication, I cannot say that in my judgment forms an objection; for I do not see how I can allow it, unless I say, this court warrants to every buyer of a house that the house is insured, and not only insured, but to the full extent of the value. The house is bought, not the benefit of any existing policy. However general the practice of insuring from fire is, it is not universal; and it is yet less general that houses are insured to their full value, or near it. The question, whether insured or not, is with the vendor solely, not with the vendee; unless he proposes something upon that; and makes it matter of contract with the vendor, that the vendee shall buy according to that fact, that the house is insured. I am therefore of opinion, that if the agent on behalf of this purchaser did accept this title previously to the destruction of the premises, the vendors are in the situation, in which they would have been if the title and the conveyance were ready at Michaelmas, 1796, but by the default of the vendee were not executed, but the title was accepted, and the premises were burnt down on the quarter day.[2]

1 "If I should buy an house, and before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house, and yet the house may be built up again." Stent *v.* Baylis, 2 P. Wms. 217, 220. — Ed.

2 Lord Eldon directed an inquiry whether the plaintiff had accepted the title as good before the fire. His opinion that the risk of loss by accidental injury to or destruction of the property is upon the buyer from the time of the bargain, has been followed generally in this country as well as in England. *Ex parte* Minor, 11 Ves. 559 (*semble* — but vendor bears loss from fire happening before confirmation of master's report); Twigg *v.* Fifield, 13 Ves. 517, 518; Rawlins *v.* Burgis, 2 V. & B. 382, 387; Harford *v.* Purrier, 1 Madd. 532, 539; Acland *v.* Cuming, 2 Madd. 28, 32; Robertson *v.* Skelton, 12 Beav. 260; Paramore *v.* Greenslade, 1 Sm. & G. 541, 544; Poole *v.* Adams, 33 L. J. Ch. 639, 12 W. R. 683 s. c.; Coles *v.* Bristowe, 6 Eq. 149, 159, 160; Castellain *v.* Preston, 11 Q. B. Div. 380, 8 Q. B. D. 613; Revell *v.* Hussey, 2 Ba. & Be. 280, 287; Columbian Co. *v.* Lawrence, 2 Pet. 25, 47;

L.R. 3 Eq. Vic. 14-17 111 N.W. 623
(Md.) 59 Atl. 242
(Mo.) 106 Mo. 290. 294.
99 S.W. 195

RAYNER *v.* PRESTON.

Court of Appeal, April 8, 1881.

[*Law Reports*, 18 *Chancery Division*, 1.]

This was an appeal by the plaintiffs from a decision of Jessel, M. R.[1]

Cotton, L. J.[2] This is an appeal from a judgment of the Master of the Rolls dismissing the action. The plaintiffs purchased from the defendants a messuage and workshops. Between the date of the contract and the time fixed for completion the buildings purchased were injured by fire. The vendors had before the contract insured the buildings against fire, but there was not in the contract any mention of this fact or of the policy. The plaintiffs brought an action to establish their right to a sum received by the vendors from the insurance office, or to have it applied in or towards reinstating the buildings injured. The Master of the Rolls decided against their claim, and from this decision the plaintiffs appealed.

It was contended by the appellants that although the contract did not mention the policy, it gave the plaintiffs, as purchasers, a right to

Osborn *v.* Nicholson, 13 Wall. 654, 660; Willis *v.* Wozencraft, 22 Cal. 607, 618; Mackey *v.* Bowles, 98 Ga. 730, 734; Phinizy *v.* Guernsey, 111 Ga. 346, 348; Sherman *v.* Loehr, 57 Ill. 509 (land taken by eminent domain); Davidson *v.* Hawkeye Co., 71 Iowa, 532 (*semble* — if buyer is in possession at time of loss); Kuhn *v.* Freeman, 15 Kan. 423 (land taken by eminent domain); Gammon *v.* Blaisdell, 45 Kan. 221 (land taken by eminent domain — damages less than purchase money); Durrett *v.* Simpson, 3 Monr. 517, 521; Johnston *v.* Jones, 12 B. Mon. 325; Calhoon *v.* Belden, 3 Bush, 674; Martin *v.* Carver (Ky. 1886), 1 S. W. R. 199; Marks *v.* Tichenor, 85 Ky. 536; Cottingham *v.* Firemen's Co., 90 Ky. 301; Brewer *v.* Herbert, 30 Md 301; Skinner *v.* Houghton, 92 Md. 68, 86; Snyder *v.* Murdock, 51 Mo. 175; Walker *v.* Owen, 79 Mo. 563; Tufts *v.* Wynne, 45 Mo. Ap. 42, 44 (*semble*); Franklin Co. *v.* Martin, 40 N. J. 568, 571; Ætna Co. *v.* Tyler, 16 Wend. 385, 396; Gates *v.* Smith, 4 Edw. Ch. 702; Rood *v.* N. Y. Co., 18 Barb. 80, 83 (*semble*); McKechnie *v.* Sterling, 48 Barb. 330; Clinton *v.* Hope Co., 45 N. Y. 454, 465 (*semble*); Mott *v.* Coddington, 1 Abb. Pr. N. S. 290, 298 but see New York cases *contra* cited in note to Thompson *v.* Gould, *infra* p. 236); Falls *v.* Carpenter, 1 Dev. & B. Eq. 237, 275 (*semble*); Gilbert *v.* Port, 28 Oh. St. 276, 293, 296; Dunn *v.* Yakish, 10 Okl. 388; Richter *v.* Selin, 8 S. & R. 425, 440 (*semble*); Robb *v.* Mann, 11 Pa. 300 (vendor in possession, injury by trespass of stranger); Insurance Co. *v.* Updegraff, 21 Pa. 513, 519; Morgan *v.* Scott, 26 Pa. 50; Demmy's Ap 43 Pa 155, 163; Reed *v.* Lukens, 44 Pa. 200; Millville Co. *v.* Wilgus, 88 Pa. 107, 108; Miller *v.* Zufall. 113 Pa. 317, 325; Imperial Co. *v.* Dunham, 117 Pa. 460. 477; Elliott *v.* Ashland Co., 117 Pa. 548, 554; Greavis *v* Gamble, 1 Leg. Gaz. R. 1, 3 (*semble*): Huguenin *v.* Courtenay, 21 S. Ca. 403, 405 (*semble*); Christian *v.* Cabell, 22 Grat. 82, 105 (*semble*); Brakhage *v.* Tracy, 13 S. Dak. 343 *Accord*.

The question was left open in Wetzler *v.* Duffy, 78 Wis. 171.

If vendor agrees expressly to deliver possession of the premises in the same condition in which they are at the time of the bargain, he must, obviously, bear the loss resulting from fire or other accident. Combs *v.* Fisher, 3 Bibb, 51; Marks *v.* Tichenor, 85 Ky. 536, 538.

It is equally clear that a person, whether he be vendor or vendee, must be answerable for any loss due to his own negligence. Mackey *v.* Bowles, 98 Ga. 730, 734; Cornish *v.* Strutton, 8 B. Mon. 586; Marks *v.* Tichenor, 85 Ky. 536, 538. — Ed.

[1] 14 Ch. D. 297.

[2] The arguments of counsel, the concurring judgment of Brett, L. J., and the discussion of the effect of the Act 14 Geo. III. c. 78 in the judgments of Cotton, L. J., and James, L. J., are omitted. — Ed.

all contracts to the benefit of which the vendors were entitled, and of which the execution would be beneficial to or improve the things purchased. This was inconsistent with one of the conditions on the back of the policy, which stipulated that assigns of the property (with certain exceptions, not including a purchaser) should not be entitled to the benefit of the insurance. But, independently of that objection, I am of opinion that the contention of the appellants cannot prevail. The contract passes all things belonging to the vendors appurtenant to or necessarily connected with the use and enjoyment of the property mentioned in the contract, but not in my opinion, collateral contracts; and such, in my opinion, at least independently of the Act 14 Geo. 3, c. 78, the policy of insurance is.

But the appellant's case was put in another way. It was said that the vendor is, between the time of the contract being made and being completed by conveyance, a trustee of the property for the purchaser, and that as, but for the fact of the legal ownership of the building insured being vested in him, he could not have recovered on the policy, he must be considered a trustee of the money recovered. In my opinion, this cannot be maintained. An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a court of equity will give effect to by transferring the property sold to the purchaser, and so far as he is a trustee he is so only in respect of the property contracted to be sold. Of this the policy is not a part. A vendor is in no way a trustee for the purchaser of rents accruing before the time fixed for completion, and here the fire occurred and the right to recover the money accrued before the day fixed for completion. The argument that the money is received in respect of property which is trust property, is in my opinion, fallacious. The money is received by virtue or in respect of the contract of insurance, and though the fact that the insured had parted with all interest in the property insured would be an answer to the claim, on the principle that the contract is one of indemnity only, this is very different from the proposition that the money is received by reason of his legal interest in the property.

The appellants, however, contended that there was authority in their favor, and it therefore becomes necessary to consider shortly the cases relied upon. The most important, and that which apparently is most in their favor is Garden *v.* Ingram,[1] a decision of Lord St. Leonards. He, affirming a decree of Vice-Chancellor Knight Bruce, declared that the purchaser from the mortgagee of a lessee was entitled to the benefit of a policy of insurance effected in pursuance of a covenant contained in the lease in the joint names of the lessor and lessee, and ordered the defendant, the lessee, to concur with the landlord in giving a receipt for the money. But there the lease contained a provision that any money recovered on the policy should be laid out in reinstating the buildings injured by fire; and this, in my opinion, was the ground on which the decision was based, and

[1] 23 L. J. (Ch.) 478.

this is the view of the case expressed by Vice-Chancellor Kindersley in Lees *v.* Whiteley,[1] The appellants also relied on the case of Durrant *v.* Friend,[2] where Vice-Chancellor Parker, though he refused to give a legatee of specific chattels, which perished at the same time with the testator, the benefit of an insurance effected on the chattels by the testator, used expressions which show that he thought the legatee would have been entitled to the policy if the chattels were shown to have existed after the testator's death. But this was *dictum* only, not decision. In Garden *v.* Ingram, Lord St. Leonards refers to a case not quoted in argument, and of which he does not give the name, in which it had been decided that a remainderman was entitled to a policy effected by a tenant for life. No such case was quoted to us, and the only case of the sort which I have been able to find is Norris *v.* Harrison,[3] in which Lord St. Leonards was counsel, and of which he probably had an imperfect recollection. In that case it is true a remainderman did receive the balance of a fund received by a previous tenant for life on account of a policy effected by such tenant for life, but he did so because the executor and residuary legatee of the tenant for life had by his will treated the fund as appropriated for the benefit of the remainderman.

In my opinion, therefore, there is no decision in favor of the appellants. Against them there is the direct decision of Vice-Chancellor Kindersley in Poole *v.* Adams.[4] It is urged by the appellants that the Vice-Chancellor arrived at this decision from an erroneous view of Lord Eldon's judgment in Paine *v.* Meller. In my opinion, though the decision of Lord Eldon is not expressly in point, yet the part of his judgment quoted by the Master of the Rolls does to some extent support the view of the Vice-Chancellor in the case referred to. In my opinion the judgment of the Master of the Rolls was correct.

James, L. J. I am unable to concur in affirming the judgment of the Master of the Rolls. According to my view of the case the plaintiff's contention is founded not only on what I may call the natural equity which commends itself to the general sense of the lay world not instructed in legal principles, but also on artificial equity as it is understood and administered in our system of jurisprudence.

I am of opinion that the relation between the parties was truly and strictly that of trustee and *cestui que trust*. I agree that it is not accurate to call the relation between the vendor and purchaser of an estate under a contract while the contract is *in fieri* the relation of trustee and *cestui que trust*. But that is because it is uncertain whether the contract will or will not be performed, and the character in which the parties stand to one another remains in suspense as long as the contract is *in fieri*. But when the contract is performed by actual conveyance, or performed in everything but the mere formal act of sealing the engrossed deeds, then that completion relates back

[1] Law Rep. 2 Eq. 148, 149.
[2] 5 De G. & Sm. 343.
[3] 2 Madd. 268.
[4] 12 W. R. 683.

to the contract, and it is thereby ascertained that the relation was throughout that of trustee and *cestui que trust*. That is to say, it is ascertained that while the legal estate was in the vendor, the beneficial and the equitable interest was wholly in the purchaser. And that, in my opinion, is the correct definition of a trust estate. Wherever that state of things occurs, whether by act of the parties or by act or operation of law, whether it is ascertained from the first or after a period of suspense and uncertainty, then there is a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is and has been a *cestui que trust*.

This being the relation between the parties, I hold it to be an universal rule of equity that any right which is vested in a trustee — any benefit which accrues to a trustee, from whatever source or under whatever circumstances, by reason of his legal ownership of the property — that right and that benefit he takes as trustee for the beneficial owner. If the policy of insurance in this case were a collateral contract, such as the policy which a creditor effects on the life of his debtor, the case would be wholly different. But the policy of fire insurance is not, in my opinion, a collateral contract, it is not a wagering contract, a contract that if a fire happens then a certain sum of money shall be paid to the insured; it is in terms and in effect a contract that, if the property is injured then the insurance company will make good the actual damage sustained by the property. That damage, and that damage only, gives the right and is the measure of the right, and it seems to me impossible to say that it is not by reason of the legal ownership and in respect solely of the injury done to that legal ownership that the right to recover from the insurance company accrued to the insured. If the fire in this case had happened through the wrongful or negligent act of a third person while the contract was *in fieri* the legal right to sue for the damage would be in the vendor, but on the completion of the contract the purchaser would be entitled to use the name of the vendor as his trustee to sue for the damage so sustained, or, if the damages had actually been recovered in the interval, to recover the damages from the vendor. And it appears to me that there is no distinction in principle between this right and the right to use the vendor's name in an action on the contract of indemnity against loss by fire which the policy of insurance is. It is not, in my view of the case, at all material to consider what would be the case if after actual conveyance and during the currency of the policy a fire had occurred. The vendor in that case would have no right as between him and the insurance office, and the purchaser would have no right of action, because one of the conditions of the policy excludes it, and, independently of that condition, the policy would, or might probably be held not to run with the land in the hands of the subsequent owner, and in that case there would not be that which is the foundation of the right — legal ownership and right in one person, and equitable ownership in another.

No doubt it is a mere accident that there was such a policy and

there was such a right. The vendee could not have complained if there had been no insurance. But that has occurred in a great variety of cases in which equitable rights have arisen. Where there is a creditor, a debtor, and a surety, and the surety finds out that by something to which he was not privy and of which he had never heard, somebody else had become surety, or the creditor had obtained security, the surety has a right to obtain contribution from such surety, or to obtain such security as the case may be, and the creditor releasing such surety or parting with such security would probably find himself in considerable peril.

In the same city in which this controversy has arisen there occurred some years ago a great destruction of property by reason of an explosion of gunpowder caused by a fire. Houses were damaged, not by fire but by the explosion caused by a fire in another neighbouring place. The insurance offices thought that it was for their interest to be very liberal and treat the damage from the explosion as a damage by fire within the policies, and to pay accordingly. This was a mere act of liberality. They thought it was for their permament benefit commercially to be liberal, and they were liberal accordingly. See Taunton *v.* Royal Insurance Company.[1] I cannot myself doubt that if a trustee, or a vendor who had become trustee by the completion of his contract, had received this bounty, he would have received it by reason of his trusteeship, and would have had to give it up to his *cestui que trust* or purchaser.

Of authority on the subject, there is, no doubt, the express decision of Vice-Chancellor Kindersley against the plaintiff, but against that there are to be set off the very distinct opinions of Lord St. Leonards and Vice-Chancellor Parker, men of great knowledge of equity and of great accuracy even in their *dicta*.

But I prefer to rest my judgment on the fact that the relation between the vendor and the purchaser became, and was in law, as from the date of the contract and up to the completion of it, the relation of trustee and *cestui que trust*, and that the trustee received the insurance money by reason of and as the actual amount of the damage done to the trust property. The plaintiff puts his case also on the ground of the representations made to him by the defendant's solicitor and agent. What took place appears to me to be this. The solicitor said to the purchaser, I don't know who is entitled, but the vendor is the only person who has a legal claim, and I will make the claim accordingly whichever is entitled, and the purchaser left the matter in his hands. Now the purchaser could at that time have applied to the office to compel the money to be laid out in restoring the building. And I am of opinion that when the money was under these circumstances obtained from the office, it reached the vendor's hands according to the then rights of the parties as between them and the insurance office, that is to say, as money which ought to be laid out in reinstating the premises, or, in other words, as money which the purchaser alone had any real or substantial interest in.

[1] 2 H. & M. 135.

BRETT, L. J. I should like to add to what I have said that I feel very great doubt whether as between the defendants and the insurance company the defendants can keep the money.

COTTON L. J. I quite concur in that doubt.[1]

SAMUEL THOMPSON *v.* THOMAS GOULD.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1838.

[20 *Pickering*, 134.]

WILDE, J.,[2] delivered the opinion of the court. This is an action of assumpsit, in which the plaintiff claims a certain sum of money paid by him to the defendant on a consideration which has failed. The money was paid on a parol agreement to purchase of the defendant a certain house and estate, which were to be conveyed to the plaintiff free and clear of all incumbrances, the defendant undertaking to discharge a mortgage on the estate, which was subsequently done, but before the estate was conveyed to the plaintiff the house was consumed by fire; and the material question is, which of the parties shall eventually sustain this loss.[3]

It has been argued that this contract may be enforced in equity. But if it might be, that would not affect the plaintiff's legal rights. This court, however, has no authority to decree a specific performance of a parol contract. Nor could this contract be enforced by a court of equity having jurisdiction of the subject matter, for by the destruction of the house the defendant is no longer able to perform his part of the contract. He may make compensation for the destruction of the house, but generally a purchaser, independently of special circumstances, is not to be compelled to take an indemnity, but he may elect to recover back the purchase money, if paid in advance, and if the vendor refuses or is unable on his part to perform the contract, and the purchaser has no legal remedy to recover damages. 1 Sugd. Vend. (9th edit.) 304; Hepburn *v.* Auld;[4] Waters *v.* Travis.[5]

[1] It was decided subsequently that the defendants must refund the insurance money to the insurance company. Castellain *v.* Preston, 11 Q. B. Div. 380, 8 Q. B. D. 613. Poole *v.* Adams, 33 L. J. Ch. 639 agrees with Rayner *v.* Preston. The following authorities accord with the dissenting judgment of Lord Justice James: Phinizy *v.* Guernsey, 111 Ga. 346; Phenix Co. *v.* Caldwell, 187 Ill. 73, 81 (*semble*); Brewer *v.* Herbert, 32 Md. 301, 313 (*semble*); Spinner *v.* Houghton, 92 Md. 68; Gates *v.* Smith, 4 Edw. Ch. 702; Ins. Co. *v.* Updegraff, 21 Pa. 513; Reed *v.* Lukens, 44 Pa. 200; Hill *v.* Cumberland Co. 59 Pa. 474 (*semble*); Farmer's Co. *v.* Graybill, 74 Pa. 17; Brackhage *v.* Tracy, 21 Utah, 343 (*semble*). — ED.

[2] Only a portion of the opinion of the court is given. — ED.

[3] The contract was made May 8, 1835. The fire occurred May 18, 1835. Between the May 8 and May 18 the plaintiff carried into the house articles of furniture and all the things which he intended to place in the house, and was frequently at the house superintending repairs which the defendant was making under the superintendence and at the expense of the plaintiff. The contract price was paid in full before the fire. — ED.

[4] 5 Cranch, 262.

[5] 9 Johns. R. 464.

The only question, therefore, is, whether the plaintiff or the defendant is to sustain the loss by fire. In respect to the loss of personal property, under the like circumstances, the principle of law is perfectly clear, and well established by all the authorities. When there is an agreement for the sale and purchase of goods and chattels, and after the agreement, and before the sale is completed, the property is destroyed by casualty, the loss must be borne by the vendor, the property remaining vested in him at the time of its destruction. Tarling *v.* Baxter,[1] Hinde *v.* Whitehouse,[2] Rugg *v.* Minett.[3] No reason has been given, nor can be given, why the same principle should not be applied to real estate. The principle in no respect depends on the nature and quality of the property, and there can therefore be no distinction between personal and real estate. And so it is laid down by Chancellor Kent in his Commentaries. "Thus if A sells his horse to B., and it turns out that the horse was dead at the time, though the fact was unknown to the parties, the contract is necessarily void. So if A, at New York, sells to B his house and lot in Albany, and the house should happen to have been destroyed by fire at the time, and the parties equally ignorant of the fact, the foundation of the contract fails, provided the house, and not the ground on which it stood was the essential inducement to the purchase." 2 Kent's Comm. (2d edit.) 367.

The same principle applies to an agreement to purchase a house, as in the present case, the house being casually destroyed before the purchase is completed. Neither party being in fault, the loss must be borne by the owner of the property.

A different doctrine has been adopted in equity, founded on the fiction, that whatever is agreed to be done, shall be considered as actually done. So that if there is an agreement to purchase, it is equivalent to an actual purchase, in contemplation of equity; and the purchaser must bear any loss which may happen to the estate between the agreement and the conveyance. In Paine *v.* Meller, where A had contracted for the purchase of some houses which were burned down before the conveyance, the loss was holden to fall upon him, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the vendee. Upon this decision Sugden remarks, that it proceeded on the only principle upon which it could be supported, that the purchaser was in equity the owner of the estate. Sugd. Vend. (9th edit.) 278. And in *Ex parte* Minor,[4] where a similar accident happened to an estate sold before a master, and the report had only been confirmed *nisi*, the loss was holden to fall on the vendor.

Formerly, however, a different doctrine was admitted in courts of equity. In Stent *v.* Baylis,[5] the Master of the Rolls said, "If I should buy a house, and before such time as by the articles I am to pay for

[1] 9 Dowl. & Ryl. 276.
[2] 7 East, 558.
[3] 11 East, 210.
[4] 11 Ves. 559.
[5] 2 P. Wms. 220.

the same, the house be burnt down by casualty of fire, I shall not in equity be bound to pay for the house, and yet the house may be built up again." So upon a sale of a leasehold for lives, and previously to the conveyance one of the lives dropped, although a specific performance was decreed, the Lord Keeper intimated, that if all the lives had been dropped before the conveyance the decision might be different, for that the money was to be paid for the conveyance, and no estate being left, there could be no conveyance. Thus it appears, that formerly the principle was the same in equity as it ever has been in law. And in one respect the principle still remains the same, namely, that the loss of the property under similar circumstances as those in the present case, must be borne by the owner of the property at the time the loss happened; and it seems impossible that any different principle can be adopted. As we therefore cannot recognize the fiction in equity, by which a purchase and an agreement to purchase are held to be similar, and indeed identical in respect to the present question, we must hold that the defendant is bound to repay the purchase money, as the consideration upon which it was paid has wholly failed, the plaintiff not being bound, under the circumstances of the case, to accept a deed of the land.

Judgment for plaintiff.

1 The doctrine that the vendor must bear the loss by fire or other accident happening between the making of the contract and its completion prevailed in the following cases: Cutcliff *v.* McAnally, 88 Ala. 507, 512; Davidson *v.* Hawkeye Co., 71 Iowa, 532, 534; Gould *v.* Murch, 70 Me. 288; Wells *v.* Calnan, 107 Mass. 514; Bautz *v.* Kuhworth, 1 Mont. 133, 136; Wilson *v.* Clark, 60 N. H. 352; Hallett *v.* Parker, 68 N. H. 598, 599; Smith *v.* McCluskey, 45 Barb. 610, 612; Goldman *v.* Rosenberg, 116 N. Y. 78 (*semble*); Listman *v.* Hickey, 65 Hun, 8 (affirmed without opinion, 143 N. Y. 630); Wicks *v.* Bowman, 5 Daly, 2 5; Powell *v.* Dayton Co., 12 Oreg. 488, 14 Oreg. 356. (But the loss was ultimately thrown upon the buyer as a lessee. Powell *v.* Dayton Co. 16 Oreg. 33.)

In Wicks *v.* Bowman, *supra*, the decision against the vendor was based upon the fact that he was in possession at the time of the loss. The *dicta* in Mackey *v.* Bowles, 98 Ga. 730, 734, 735, and Davidson *v.* Hawkeye, *supra*, point in the same direction. But, on the one hand, the American courts which have adopted the doctrine of Paine *v.* Meller appear to have attached no importance to the question of possession; and, on the other hand, of the five State courts which have departed from the doctrine of Paine *v.* Meller, four, Maine, Massachusetts, New Hampshire, and Oregon, have thrown the loss on the vendor, although the vendee was in possession at the time of the fire. The argument in favor of making the loss occurring between the making of the contract and its performance fall upon the party in possession at the time can hardly be put more forcibly than by Professor Williston in an essay in 9 Harv. L. Rev. 106. The prevailing doctrine to the contrary is supported with much ability by Professor Keener in the opening article in 1 Columbia L. Rev. 1. — ED.

BLEW, Respondent, *v.* McCLELLAND, Appellant.

Supreme Court, Missouri, January Term, 1860.

[29 *Missouri Reports*, 304.]

Napton, J., delivered the opinion of the court.[1]

On the 8th of November, 1856, Blue, the plaintiff, made a verbal contract with McClelland for the purchase of a lot in the town of Princeton, Mercer county, on which there was a tavern and other buildings. The improvements constituted the principal value of the property. The price agreed on was $1550, five hundred of which was paid down. McClelland was to execute on the same day, or the Monday following, a title bond for a conveyance of the title when the purchase money was paid, and Blue was to give his notes for the balance of the purchase money. On Sunday, the 9th of November, the buildings were all destroyed by fire. Nothing further was done; the title bond, although tendered, was never received, and the notes for $1050 were not executed. McClelland had a policy of insurance on the premises for eight hundred dollars, which he collected from the company, representing himself as the owner, and which in his answer he offers to treat as a liquidation of the purchase money *pro tanto*. This suit is brought by Blue to recover the five hundred dollars purchase money advanced, and the only question presented by the record is whether, under these circumstances, the action will lie.

The case of Paine *v.* Meller is understood to have determined that, where there is a contract for the sale of a house, and before a conveyance the house is burned down, the loss falls on the purchaser, and the purchaser is still bound to execute his agreement to pay the purchase money. This does not appear to have been the opinion of the Master of the Rolls in Stent *v.* Baylis,[2] who thought, in such a case, the purchaser would not be bound. But Sir Edward Sugden seems to regard the decision of Lord Eldon in Paine *v.* Meller as the true exposition of the law. It is based upon the doctrine that equity regards as done what has been agreed to be done, and therefore, after a valid agreement to purchase, looks upon the purchaser as the owner. Hence Sir Edward Sugden declares the law to be that a "vendee, being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and, on the other hand, he will be entitled to the benefit which may accrue to the estate in the interim."[3] The principle has, in England, been carried to the extent of holding that, where an agreement was made for the purchase of an estate in consideration of an annuity for life to the vendor, and

1 Only the opinion of the court is given. — Ed.

2 2 P. Wms. 220.

3 1 Sugden on Vendors, 277.

he dies before the conveyance and before the annuity becomes due, the contract will still be specifically enforced.[1]

But the maxim of courts of equity, that whatever is agreed to be considered as done is actually performed, is confined to cases where the contract or agreement is a valid one and can be enforced. If the contract, by reason of its being by parol, is one which neither a court of equity or of law can enforce, and nothing has been done to withdraw it from the operation of the statute of frauds, the title remains as it was, both in law and equity, unaffected by the parol agreement; and whatever accidental losses the property may sustain must of course fall upon the owner. In such a case, it is clear that if, after the parol agreement to purchase, a valuable gold mine was found upon the premises, the purchaser could not compel a specific performance, unless there had been a change of possession or some other circumstance which courts have determined sufficient to take a case out of the statute. Neither ought he to be compelled to pay his purchase money, when a fire has destroyed the buildings which formed the principal inducement for the purchase. It would be very inequitable to adopt a rule which would not operate alike on vendor and vendee, which would leave it to the option of one to enforce the contract or not, as it might promote his interest or caprice. The case of McGowan *v.* West[2] was a case where the purchaser had taken possession, and by reason of that circumstance could have enforced a conveyance notwithstanding the contract was by parol. This court would not permit him to hold on to the land, and set up, as a defence to a suit upon his note for the purchase money, that the contract was a parol one. In the present case, there was no change of possession, and there was no other circumstance which would have enabled the plaintiff to enforce a specific performance of the contract had the estate, instead of being almost rendered valueless, been unexpectedly increased in value. As the contract could not be enforced by the purchaser, it would be unjust to enforce it against him. Cunnutt *v.* Roberts.[3]

Judge Scott concurring, the judgment of the circuit court is affirmed. Judge Ewing, having been of counsel, did not sit in this case.[4]

1 Mortimer *v.* Cupper, 1 Bro. C. C. 156; Jackson *v.* Lever and others, 3 Bro. C. C. 605.
2 7 Mo. 563.
3 11 B. Monr. 42.
4 Mackey *v.* Bowles, 98 Ga. 730; Phinizy *v.* Guernsey, 111 Ga. 346; Lombard *v.* Chicago Co., 64 Ill. 477; 75 Ill. 271; Calhoon *v.* Belden, 3 Bush, 674; Smith *v.* Cansler, 83 Ky. 367; Kinney *v.* Hickox, 24 Neb. 167; Goldman *v.* Rosenberg, 116 N. Y. 78; Christian *v.* Cabell, 22 Grat. 82 *Accord.* — ED.

BLACK and Others, Claimants; HOMERSHAM, Defendant.

In the Exchequer Division, November 18, 1878.

[*Law Reports*, 4 *Exchequer Division*, 24.]

Special Case, from which the following facts are taken.

On the 30th of June, 1877, the defendant was the registered holder of 251 shares in the Mitcham and Wimbledon District Gas Light Company. Some of these shares were sold by public auction on the 1st of August, 1877, and the remainder were sold on subsequent days prior to the 21st of August, 1877. All the sales were made and completed in accordance with printed particulars and conditions of sale, the third of which was as follows: "Each purchaser shall immediately pay into the auctioneer's hands a deposit of 20*l.* per cent. in part of his or her purchase money, and sign an agreement for payment of the remainder on the 29th of August, 1877, at the office of the vendor's solicitor, when and where the purchases are to be completed, and in this respect time shall be of the essence of the contract." Another of the conditions of sale was, "If either of the purchasers neglect or fail to complete his purchase on the 29th of August, 1877, the deposit money shall be absolutely forfeited to the vendor."

In pursuance of a notice dated the 8th of August, 1877, the ordinary half yearly general meeting of the shareholders of the company was held on the 28th of August, 1877, when a dividend for the half year which ended the 30th of June, 1877, was declared. The transfer books of the company were closed from the 13th to the 28th of August.

No mention of any dividend was made either in the printed particulars and conditions of sale, or by the auctioneer, or by any other person on the defendant's behalf at the sales.

The claimants were the several purchasers of some of the shares and paid the balance of the purchase money on the 29th of August, but in the case of one of the claimants a transfer was executed to him on the 24th of August.

The question for the opinion of the court was, whether under these circumstances the claimants or the defendant were entitled to the dividend on the shares declared on the 28th of August, 1877.

Webster, Q. C. (*Candy*, with him), for the defendant. By analogy to real property, the ordinary profits of these shares until the completion of the sale belonged to the vendor: Poole *v.* Shergold;[1] and there can be no such thing as relation back where the conditions of sale fix the time for completion.[2]

Kelly, C. B. I am clearly of opinion that the completion of the purchase has relation back to the time when the contract was made, which vested from that moment the right to the shares in the pur-

[1] 1 Cox, 273.

[2] A portion of the argument for defendant is omitted. — Ed.

chasers. They purchased the shares on that day and at that time, and at their then value, and when they paid the remainder of the purchase money at the time fixed for completion they had a complete title to the shares as they bought them on the 1st of August. It is a different case from that of real property, and the suggested analogy does not, in my opinion, hold.

CLEASBY, B. I am of the same opinion. I think it would be very strange if the matter were determined otherwise; for we know that the value of such property falls immediately a dividend is paid. The purchaser bought at the value before dividend, and if he does not receive it he will be paying so much more for his shares than he bargained for.

Judgment for the claimants.[1]

1 Phinizy *v.* Murray, 83 Ga. 747 (*semble*); March *v.* Eastern Co., 43 N. H. 515; Currie *v.* White, 45 N. Y. 822 *Accord.*

Liability for Calls. — The purchaser is liable for calls or assessments imposed after the contract to sell shares although before the transfer on the books of the company. Coles *v.* Bristowe, 6 Eq. 149, 4 Ch. 3; Hawkins *v.* Maltby, 4 Ch. 200.

Fines as Profits of a Manor. — Fines incident to the death of tenants of a manor belong to the vendor in the case of tenants who died between the making of the contract of sale and the time appointed for the conveyance and payment of the purchase money, even though the fines have not been formally adjudged in the manorial court. Garrick *v.* Camden, 2 Cox, Eq. 231; Cuddon *v.* Tite, 1 Giff. 395.

OUTGOINGS. — The vendor is liable for outgoings up till the time fixed for completion of the contract, and the vendee pays them thereafter. Barsht *v.* Tagg, 1900, 1 Ch. 231 (costs of abating a nuisance). 1904, 1 Ch. 46 and 1904, 1 Ch. 493

TAXES. — In the absence of special agreement the vendee bears the burden of taxes from the time he has the right of possession, the vendor being liable up to that time. Sherman *v.* Savery, 2 Fed. R. 505; Taylor *v.* Robinson, 34 Fed. R. 678; Nat. Bank *v.* Danforth, 80 Ga. 55; Wells *v.* Mayor, 87 Ga. 397; Carey *v.* Gundlefinger, 12 Ind. Ap. 645; Miller *v.* Corey, 15 Iowa, 166; Farber *v.* Purdy, 69 Mo. 601; Brown *v.* Brown, 124 Mo. 79; Anderson *v.* Howard, 47 Mo. Ap. 660, 118 N.W. (Ia.) 43; 62 N.J. Eq. - 66 Atl. Rep. 191)

VENDOR LIKENED TO A MORTGAGEE. — The vendor retaining the title as security for the payment of the purchase money has been often spoken of as a mortgagee. Crockford *v.* Alexander, *supra*, 221; Boone *v.* Chiles, 10 Pet. 177, 224; Haley *v.* Bennett, 5 Port. 452, 470; Driver *v.* Hudspeth, 16 Ala. 348, 351; Conner *v.* Banks, 18 Ala. 42, 44; Kelly *v.* Payne, 18 Ala. 371, 373; Hughes *v.* Hatchett, 55 Ala. 631, 634; Wolffe *v.* Nall, 62 Ala. 24, 25; Lowery *v.* Paterson, 75 Ala. 109, 111; Moses *v.* Johnson, *supra*, 222, n. 2; Ashurst *v.* Peck, 101 Ala. 499, 509; Hester *v.* Hunnicutt, 104 Ala. 282, 287; Loventhal *v.* Home Co., 112 Ala. 108, 113; Gravlee *v.* Williams, 112 Ala. 539, 544; Love *v.* Butler, (Ala. 1901) 30 So. R. 735, 736; Lewis *v.* Boskins, 27 Ark. 61, 63; Holman *v.* Patterson, 29 Ark. 357, 363; Garnett *v.* Williams, 31 Ark. 240, 247; McConnell *v.* Beattie, 34 Ark. 113, 115; Martin *v.* O'Bannon, 35 Ark. 62, 68; Strauss *v.* White, 66 Ark. 167, 170; Sparks *v.* Hess, 15 Cal. 186; Miller *v.* Waddingham, 91 Cal. 377, 381; Small *v.* Slocumb, 112 Ga. 279, 280; Stevenson *v.* Loehn, 57 Ill. 509, 511; Wright *v.* Troutman, 81 Ill. 374, 378; Hutchinson *v.* Crane, 100 Ill. 269, 274; Lewis *v.* Shearer, 189 Ill. 184, 186; Amory *v.* Reilly, 9 Ind. 490, 493; Jackson *v.* Snell, 34 Ind. 241, 244; Rand *v.* Garner, 75 Iowa, 311, 313; Stevens *v.* Chadwick, 10 Kan. 406, 414; Kuhn *v.* Freeman, 15 Kan. 423, 427; Ricker *v.* Moore, 77 Me. 292, 295; Look *v.* Norton, 94 Me. 547; Tanner *v.* Hicks, 12 Miss. 294, 300; Kloke *v.* Gardels, 52 Neb. 117, 122; Hendrix *v.* Barker, 49 Neb. 369; Allen *v.* Taylor, 96 N. Ca. 37, 41; Killebrew *v.* Hines, 104 N. Ca. 182, 188; First Bank *v.* Pearson, 119 N. Ca. 494, 496; Millville Co. *v.* Wilgus, 38 Pa. 107, 110; Scott *v.* Wharton, 2 Hen. & M. 25; Button *v.* Schroyer, 5 Wis. 598, 599; Church *v.* Smith, 39 Wis. 492, 495; Superior Co. *v.* Nichols, 81 Wis. 656, 659.

But a contract of sale and purchase is not a technical mortgage within certain statutes. Kloke *v.* Gardels, 52 Neb. 117; State *v.* Sheridan, 1 Clarke, Ch. 533; Yankton Ass'n *v.* Dowing, 10 S. Dak. 535; Landon *v.* Bank, 36 Wis. 378; Church *v.* Smith, 39 Wis. 492. See, on the other hand, Miller *v.* Corey, 15 Iowa, 166, 168.

VENDOR LIKENED TO A TRUSTEE.—A vendor of land is often described as a trustee. If the purchase money has been paid, the term trustee is not inapt, since the vendor holds the dry legal title, the entire beneficial interest being in the buyer. A paid vendor is, accordingly, a trustee under the English Trustee Acts of 1850, 1890, and 1893 authorizing the transfer of the title by an order of the court from an infant, lunatic, or non-resident trustee to a newly appointed trustee. *Re* Cuming, 5 Ch. 72; *Re* Russell's Est., 12 Jur. N. S. 224; *Re* Collingwood's Trusts, 6 W. R. 536; *Re* Bradley's Est., 54 L. T. Rep. 43, 34 W. R. 148 S. C. A similar order was made in *Re* Pagani, 1892, 1 Ch. 236, although only a part of the purchase money was paid, and in *Re* Angelo, 5 DeG. & Sm. 278, and *Re* Lowry's Will, 15 Eq. 78, although none of the purchase money had been paid. But this last case was criticised in *Re* Colling, 32 Ch. Div. 333, in which it was decided, following *Re* Carpenter, Kay, 418, that no such order should issue until after a decree for specific performance had been given against the vendor.

In the few cases arising under similar legislation in this country the vendor, whether paid or unpaid, has been regarded as a trustee. Boyce *v.* Pritchett, 6 Dana, 231; Felch *v.* Hooper, 119 Mass. 52; Swartout *v.* Burr, 1 Barb. 495.

An unpaid vendor is not a trustee, and the vendee is not a *cestui que trust* under the English Statute 29 Charles II. c. 3, § 10, and the similar statutes in this country allowing execution at law against the interest of a *cestui que trust*. Ledbetter *v.* Anderson, *supra*, 213, 214, n. 2.

The legal title to land which the testator has contracted to sell will pass under a will devising his 'trust estates.' Lysaght *v.* Edwards, 2 Ch. D. 499.

VENDEE REGARDED AS OWNER. —

Insurance Policies. — Since the land bargained for is in equity, from the moment of the contract, the real property of the buyer, he may properly describe himself, in an insurance policy, as the 'sole owner' or the 'unconditional owner' or the 'owner in fee simple,' whether the purchase money be paid or not. Rumsey *v.* Phœnix Co., 2 Fed. R. 527; Lewis *v.* New England Co., 29 Fed. R. 496; Loventhal *v.* Home Co., 112 Ala. 108 (qualifying Liberty Co. *v.* Boulden, 96 Ala. 508); Hough *v.* City Co., 29 Conn. 10; Bonham *v.* Iowa Co., 25 Iowa, 328; Weiner *v.* Milford Co., 153 Mass. 335; Dupreau *v.* Hibernia Co., 76 Mich. 615; Hamilton *v.* Ins. Co., 98 Mich. 535; Knop *v.* Nat. Co., 101 Mich. 359; Gaylord *v.* Laman Co., 40 Mo. 13 (*semble* — see, however, Hubbard *v.* North British Co., 57 Mo. Ap. 1); Franklin Co. *v.* Martin, 40 N. J. 568; Martin *v.* State Co., 44 N. J. 485; Aetna Co. *v.* Tyler, 16 Wend. 385; Pelton *v.* Westchester Co., 77 N. Y. 615; Dohn *v.* Farmers' Co., 5 Lans. 275; Acer *v.* Merchants' Co., 57 Barb. 68 (see also Carpenter *v.* German Co., 135 N. Y. 298); Baker *v.* State Co., 31 Oreg. 41; Millville Co. *v.* Wilgus, 88 Pa. 107; Chandler *v.* Commerce Co., 88 Pa. 223; Susquehanna Co. *v.* Staats, 102 Pa. 529; Penn Co. *v.* Dougherty, 102 Pa. 568; Lebanon Co. *v.* Erb, 112 Pa. 149; Imperial Co. *v.* Dunham, 117 Pa. 460; Elliott *v.* Ashland Co., 117 Pa. 548; East Texas Co. *v.* Dyches, 56 Tex. 565; Queen Co. *v.* May (Tex. Civ. App. 1896), 35 S. W. R. 829; Swift *v.* Vermont Co., 18 Vt. 305; Johannes Co. *v.* Standard Co., 70 Wis. 196 (distinguishing Hinman *v.* Hartford Co., 36 Wis. 159).

Courts have gone pretty far here.

Conversely the vendor cannot correctly describe himself in an insurance policy as the owner of the property. Clay Co. *v.* Huron Co., 31 Mich. 346; Hamilton *v.* Dwelling Co., 98 Mich. 535; Rathmell *v.* Aurora Co., 38 W. N. (Pa.) 356; Walter *v.* Sun Office, 165 Pa. 381 (*semble*); Collins *v.* London Co., 165 Pa. 298 (*semble*).

Mechanics' Lien Laws. — The vendee is commonly regarded as owner under the Mechanics' Lien Laws. Monroe *v.* West, 12 Iowa, 119; Stockwell *v.* Carpenter, 27 Iowa, 119; Chicago Co. *v.* Osborn, 40 Kan. 168; Meyer Co. *v.* Brown, 46 Kan. 543; Mulvane *v.* Chicago Co., 56 Kan. 675; Merritt *v.* Pearson, 76 Ind. 44; Jodd *v.* Duncan, 9 Mo. Ap. 417; Belmont *v.* Smith, 1 Duer, 675; Ragon *v.* Howard, 97 Tenn. 334; Edwards Co. *v.* Mosher, 88 Wis. 672, 677. And the vendor is not so regarded. Gay *v.* Brown, 1 E. D. Sm. 725; Miller *v.* Clark, 2 E. D. Sm. 543; Loonie *v.* Hogan, 9 N. Y. 435 (overruling McDermott *v.* Palmer, 11 Barb. 9); Burbridge *v.* Marcy, 54 How. Pr. 446; Dugan *v.* Brophy, 55 How. Pr. 121.

But see *contra* Johnson *v.* Pike, 35 Me. 291; Gray *v.* Carleton, 35 Me. 481; Metcalf *v.* Hunnewell, 1 Gray, 297; Hayes *v.* Fessenden, 106 Mass. 228; Courtemanche *v.* Blackstone Co., 170 Mass. 50 (but see Forbes *v.* Mosquito Club, 175 Mass. 432, 436); Steinmetz *v.* Boudinot, 3 S. & R. 541; Edwards Co. *v* Mosher, 88 Wis. 672 (vendor considered as owner); Galveston Ass'n *v.* Perkins, 80 Tex. 62; Faber *v.* Muir, (Tex. Civ. Ap. 1901) 64 S. W. 938.

Miscellaneous Statutes. — A vendee was held not to be an owner in Tracy *v.* Reed, 38 Fed. R. 69 (Oregon law as to taxes); Gravlee *v.* Williams, 112 Ala. 539 (statute imposing penalty for cutting trees).

CONTRACT TO SELL AS A CONVEYANCE. — A contract for sale and purchase is regarded as a conveyance within the language of certain statutes. Parks *v.* Smart, (Ky. 1900) 48 S. W. R. 146.

GEORGE HOWARD *v.* JOSEPH W. KIMBALL.[1]

SUPREME COURT, NORTH CAROLINA, JANUARY TERM, 1871.

[65 *North Carolina Reports*, 175.]

THIS was a civil action submitted to his Honor, Judge Jones, at the Fall Term, 1870, of Edgecombe Superior Court, upon the following case agreed: —

On the 1st day of January, 1867, B. B. Nicholson contracted to sell to J. W. Kimball, the defendant, a tract of land for which two notes for $1,000 each, payable on the 1st of January, 1868 and 1869, with interest from date, were given in part payment. The notes expressed on their face to be in payment "on the Rocky Swamp tract of land." Nicholson gave to Kimball a bond to make title to the land upon the payment of the purchase money. In the spring of 1867, Nicholson purchased of one David W. Bullock a tract of land, and in payment of the same, and for the stock on it, endorsed the said notes in blank and handed them to Bullock, he, Bullock, at the time being aware that Nicholson had given bond to make title to the tract of land he had sold to the defendant, Kimball.

The plaintiff admits that there is a defect in the title of Nicholson to part of the land sold to Kimball.

Some time afterwards, Nicholson becoming involved, made a conveyance to Bullock of the land sold to Kimball, in trust, to convey to Kimball when the notes should be paid, and when Bullock passed the notes to the plaintiff, he made a like conveyance of the land to him. The conveyance to Bullock was made before the discovery of any defect in the title of Nicholson, and the conveyance to the plaintiff afterwards. Nicholson is a bankrupt and has obtained his discharge

On the other hand such a contract is not treated as a conveyance within the language of other statutes. Commissioners *v.* Angus, 23 Q. B. Div. 579.

CONTRACT TO SELL NOT A CHANGE OF TITLE AVOIDING INSURANCE POLICY. — A contract to sell is not a breach of the condition in an insurance policy rendering the policy void in case of a change of title, this condition being interpreted as meaning the legal title. Smith *v.* Phenix Co., 91 Cal. 323; Home Co. *v.* Bettel, 142 Ill. 537; Phenix Co. *v.* Caldwell, 187 Ill. 73; Kempton *v.* State Co., 62 Iowa, 83; Washington Co. *v.* Kelly, 32 Md. 421; Gibb *v.* Phila. Co., 59 Minn. 267, 273; Grable *v.* German Co., 32 Neb. 645 (buyer in possession; Browning *v.* Home Co., 71 N. Y. 508; Masters *v.* Madison Co., 11 Barb. 624 (buyer in possession); Shotwell *v.* Jefferson Co., 1 Bosw. 247; Perry Co. *v.* Stewart, 19 Pa. 45; Hill *v.* Cumberland Co., 59 Pa. 474; Farmers' Co. *v.* Graybill, 74 Pa. 17; Collins *v.* London Co., 165 Pa. 298, 308.

The opposite result was reached in Davidson *v.* Hawkeye Co., 71 Iowa, 532, on the ground that the buyer was in possession. Reed, J., dissented. See also Pringle *v.* Des Moines Co., 107 Iowa, 742, 746.

CONTRACT TO SELL IS A CHANGE OF INTEREST. — If a policy of insurance contains a condition making it void in case of any change of interest in the property insured, it is avoided by a subsequent contract to sell. Skinner *v.* Houghton, 92 Md. 68; Gibb *v.* Phila. Co., 59 Minn. 267; Germond *v.* Home Co., 5 Th. & C. 120.

But see *contra* Grable *v.* German Co., 32 Neb. 645 (buyer in possession).

1 This case belongs properly after Button *v.* Schroyer, *supra*, 225. — ED.

as such. When Bullock received the notes he executed an absolute conveyance of the land he sold to Nicholson.

His Honor upon this case agreed, was of the opinion that the plaintiff could not recover upon the notes; and a judgment accordingly and for costs was entered upon the record of the court, and the plaintiff appealed.[1]

PEARSON, C. J. 1. Suppose Nicholson, the original vendor, had kept the land, then upon the facts agreed, Kimball, the vendee, would have had a clear equity to rescind the contract of sale, on the ground of a defect in the title, to a substantial part of the thing sold. A purchaser is entitled to all that he bargains for, and is under no obligation to accept a part, with warranty as to the other, or to accept compensation, unless indeed the part, as to which a good title cannot be made, does not materially affect the value, and it can be seen that the objection is not taken upon the merits, but as a pretext to get rid of the bargain.

2. As Nicholson endorsed the notes in blank to Bullock, before maturity, there is a presumption that he purchased without notice; but this presumption may be rebutted by proof of any fact that should put a man of ordinary prudence upon inquiry. We think the fact of the notes not being in the usual form of promises to pay money "for value received," but expressing on the face that they were given for the purchase money of the Rocky Swamp tract of land, was sufficient to put Bullock on inquiry, and to fix him with notice, that the notes could not be collected, unless a good title be made to Kimball. Cox *v.* Jerman.[2] In this way significance is given to the words referred to, otherwise they must be treated as idle and superfluous.

It is said notice that the notes were given as the consideration of the Rocky Swamp tract of land does not amount to notice of a defect in the vendor's title. That may be so, but it does amount to notice of the vendee's equity, provided it turns out that the title is defective.

If a vendee executes a plain note of hand, this equity may be defeated by a transfer of the note, before it is due, but when he takes the precaution to set the fact out in the face of the note, unless it has the effect of notice, the vendor may in every instance defeat the equity of the vendee by making haste to dispose of the note, and thus the vendee will be deprived of an equity without default on his part.

The fact that Bullock took a deed for the land from Nicholson in trust to convey to Kimball on payment of the purchase money, substituted Bullock in the place of Nicholson, and put him in the relation of vendor in respect to Kimball. He was to receive the whole of the purchase money and to make title, according to the original contract of sale.

3. Such being the equity of the defendant as against Nicholson and Bullock, it is so beyond all question in regard to the plaintiff, for he had positive notice of the defect in the title before he purchased the notes, and he also took a deed for the land in trust to make title on

[1] The statement of the case is slightly abridged. — ED.

[2] 6 Ire. Eq. 526.

payment of the purchase money, and took upon himself the relation of vendor towards the defendant.

We concur with his Honor, that the plaintiff was not entitled to judgment, but the judgment rendered for the defendant is erroneous in this: it discharges the defendant from the payment of the purchase money, but leaves the bond for title in his hands, as a cloud over the title of the plaintiff.

The judgment ought to have been, that the contract of sale be rescinded, and the title bond and the notes be cancelled, so as to effect what would have been done in equity under the old mode of procedure.

Such judgment will be entered, and each party will pay his own cost.

PER CURIAM. *Judgment accordingly.*[1]

1 Zebley v. Sears, 38 Iowa, 507 *Accord.* — ED.

A contracted to sell land to B in ... two notes in payment ... of land; A gave a bond to make conveyance ... A bought land of C & indorsed these notes in blank to him, C knowing of the bond for title ... Later A conveys the land to C to hold in trust for B. C made a like ... conveyance ... the land & notes to D. D knew of the deficit of ... title. Can B recover the notes?

SECTION IV.

Partial Performance with Compensation.

DYER *v.* HARGRAVE.

In Chancery, before Sir William Grant, M. R., March 13, 1805.

[10 *Vesey*, 505.]

The object of the bill was to compel the defendant to complete his contract for the purchase of a leasehold farm from the plaintiff as executor.

The premises were sold by auction upon the 23d of February, 1802. The particular described the house as being in good repair, and the farm, as consisting of 150 acres, part arable, and part marsh land, in a high state of cultivation; all within a ring-fence.

The objections taken by the answer were that the house was not in good repair; that the lands, instead of answering the description of a high state of cultivation, were in a very impoverished state, from neglecting to manure and drain; and the farm was not in a ring-fence, but was intersected by other lands. Upon these objections there was a great deal of contradictory evidence: for the defendant, supporting the answer: for the plaintiff, that an expenditure of only 25*l.* would put the house in complete repair; that the land was in a high state of cultivation; and that the farm answered the description, as lying within a ring-fence.[1]

The Master of the Rolls, having during the argument said it was held at law that a warranty is not binding where the defect is obvious; and put the case of a horse with a visible defect: a house without a roof or windows, warranted as in perfect repair, pronounced the following judgment: —

It is impossible to refuse a performance of this contract. It is much too late to contend that every variance from the description will enable a man to resist the performance. The principle is, that, if he gets substantially that for which he bargains, he must take a compensation for a deficiency in the value.[2] Whether the court has not in

1 The statement is slightly abridged and the arguments are omitted. — Ed.

2 In accordance with this principle specific performance was decreed in favor of the vendor in the following cases: —

Small Deficiency in the Quantity of the Res. — Poole *v.* Shergold, 1 Cox, 273; 2 Bro. C. C. 118 s. c.; Calcraft *v.* Roebuck, 1 Ves. Jr. 221; McQueen *v.* Farquhar, 11 Ves. 467; Binks *v.* Rokeby, 2 Sw. 222; King *v.* Wilson, 6 Beav. 124; Foley *v.* Crow, 37 Md. 51; Corless *v.* Sparling, Ir. R. 9 Eq. 595 (*semble* — deficiency too slight to be estimated); Beyer *v.* Marks, 2 Sweeny, 715; Leigh *v.* Crump, 1 Ired. Eq. 299; Courcier *v.* Ravises, 2 Oh. 341 (*semble*);

many cases gone beyond the spirit of that rule is another consideration. Whether the court ought to compel a defendant to take compensation for that, which can hardly be estimated by pecuniary value may admit of doubt. In this case there can be no doubt, except as to the objection that the premises are not in a ring-fence, whether the whole is not the subject of pecuniary compensation. As to the repairs, unless it could be shown that the defendant wanted possession of the house to live in at a given period, it is mere matter of pecuniary estimation. The same observation applies to the situation of the marsh land: the defendant loses nothing but money by finding that in a worse state of cultivation than it was represented. That admits a certain estimation. It is not quite so certain that a precise pecuniary value could be set upon the difference between a farm, compact, in a ring-fence, and one scattered, and dispersed with other lands. But in this instance the purchaser is clearly excluded from insisting upon that as an objection to complete the contract. He saw the farm before he purchased. He was willing to purchase it by private contract. He had lived in the neighborhood all his life. This variance is the object of sense. He must have known whether the farm did lie in a ring-fence or not. It is sworn by one witness that it was distinctly pointed out to him that there were fields belonging to other persons lying intermixed. But, independent of that he could not conceive himself purchasing anything in a ring-fence; for the evidence of his own witnesses shows that there are thirty or forty acres of others intermixed above his one hundred and fifty acres; and he does not pretend that he thought the farm larger than it turns out to be. He had repeated opportunities of going over the farm. If he acquiesces in the situation of what he purchased, and goes on with the treaty, he cannot afterwards get rid of the contract.[1]

Whether compensation is to be made is a different consideration. Upon the same ground that the defendant cannot get rid of the contract on account of the difference in the description of the farm he

Stoddart *v.* Smith, 5 Binn. 355; Nagle *v.* Newton, 22 Gratt. 814; Farris *v.* Hughes, 89 Va. 930; Creigh *v.* Boggs, 19 W. Va. 240.

Lord Thurlow went so far as to decree performance, with compensation to the buyer, of a contract to buy a house and wharf, although the seller could not convey the wharf, which was the main thing. But this case has been deservedly criticised by later judges. Drewe *v.* Hanson, 6 Ves. 675, 678; Stapylton *v.* Scott, 13 Ves. 425, 427.

Defect in the Quality of the Res. — Grant *v.* Munt, Crop. 173 (premises out of repair); Scott *v.* Hanson, 1 Russ. & M. 128 (2 out of 14 acres not meadow land); Powell *v.* Elliot, 10 Ch. 424 (misrepresentation as to annual profits of colliery); Stewart *v.* Conyngham, 1 Ir. Ch. R. 534 (small part of land not timber land); Towner *v.* Tickner, 112 Ill. 217 (premises out of repair — a few fixtures of mill lacking); King *v.* Bardeau, 6 Johns. Ch. 38 (position of building misdescribed); Smyth *v.* Sturges, 108 N. Y. 495 (*semble* — emoval of certain fixtures).

Small Incumbrance upon the Res. — Howland *v.* Norris, 1 Cox, 59 (but see Lord Eldon's criticism in Drewe *v.* Hanson, 6 Ves. 675, 678); Halsey *v.* Grant, 13 Ves. 73; Horniblow *v.* Shirley, 13 Ves. 81 (see Drewe *v.* Hanson, 6 Ves. 675); Fildes *v.* Hooker, 3 Madd. 193, 195; Binks *v.* Rokeby, 2 Sw. 222; Esdaile *v.* Stephenson, 1 S. & S. 122, 124; Smith *v.* Tolcher, 1 Russ. 302; Bowles *v.* Waller, Hayes, 439; Winne *v.* Reynolds, 6 Paige, 407; Guynat *v.* Mantel, 4 Duer, 86; Thompson *v.* Carpenter, 4 Barr, 132. — Ed.

[1] Bowles *v.* Round, 5 Ves. 508.

cannot be entitled to compensation; for it was an object of sense. He could not be deceived. He could not have an imperfect knowledge: for, if he had any knowledge, that anything was mixed with the subject of his purchase, that puts an end to the description; and, if I give him compensation, having that knowledge, he gets a double allowance; for, if he has knowledge that what he proposes to purchase does not answer the description, it must be taken that he bids so much the less. The two other objections admit a different consideration; for they are such as a man may have an indistinct knowledge of; and he may have some apprehension that in those respects the premises do not completely correspond with the description; and yet the description may not be so completely destroyed as to produce any great difference in his offer. As to the marsh land it is very uncertain whether by any view it was possible for him to judge of that. It is stated by many witnesses that the season of the year was just at the breaking up of a frost; and represented that no man could at that time say whether the land was well or ill cultivated. So, he may have seen some trifling defects in the house; and might not intend to make the objection if they turned out to be nothing more than they appeared upon the surface. He might consider them too trivial; and not mean to claim compensation for an object so insignificant. But afterwards, when he came to examine, according to this evidence, he discovered that the house was materially defective, very much out of repair. Admitting that he might by minute examination make that discovery he was not driven to that examination; the other party having taken upon him to make a representation: otherwise he would be exonerated from the consequence of that in every case, where by minute examination the discovery could be made. The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe. This purchaser, therefore, is entitled to compensation for the defects of the house and the cultivation of the marsh land; but not for the other subject of objection.[1]

PERKINS *v.* EDE.

In Chancery, before Sir John Romilly, M. R., November, 9, 1852.

[16 *Beavan*, 193.]

Some property, consisting of a residence and about four acres, was sold in the suit to Mr. Forbes. The question was, whether a good title could be made. It appeared that part of the property consisted of a slip of ground between the house and public highway, which the

1 In Oldfield *v.* Round, 5 Ves. 508, performance was decreed of a contract to buy a meadow and no compensation was allowed for a foot-path across it, because it was obvious. See, however, Lord Manners's criticism in Ellerd *v.* Llandaff, 1 Ba. & Be. 241. — Ed.

vendors claimed as part of an allotment under an inclosure. This they failed in establishing.

Mr. *Roubell*, Mr. *Shebbeare* and Mr. *Rudall*, for the vendors, argued, that, even if the title were bad, as regarded the small slip of land, it was a matter of compensation, and not a ground for rescinding the contract.[1]

The MASTER of the ROLLS.

Under ordinary circumstances, this would be a case for compensation; but here is a house with a long strip of land between it and the road, to which there is no title, so that the people, in passing, can look in at the window. This is not a case for compensation.[2]

ISAAC CLEATON *v.* W. L. GOWER AND F. CARLETON.

IN CHANCERY, BEFORE LORD FINCH, K., MICHAELMAS TERM, 1674.

[*Cases tempore Finch*, 164.]

THE plaintiff, being tenant to the defendant Gower, by a lease of lands in coal-pit banks, and other lands, part of the manor of Kelsey in Shropshire, in which there were mines of coal, iron, stone, and stones for building, did, about June, 1669, come to an agreement with the defendant, and with Sir Thomas Gower, his late father, that he (the plaintiff) should open the mines, and set on foot the works at his own charge, the defendant allowing cordwood for that purpose, at the rates in the bill mentioned, and that the plaintiff should quietly enjoy and take to his own use the coal, iron, stone, and stones for the building, within the royalty of the said manor and coal-pit banks, for ten years, if the defendant Gower, or any of his issue male should so long live, to commence from June, 1669, at or under the yearly rent of 25*l.*

Accordingly the plaintiff entered, pursuant to this agreement, and paid for the cordwood at the rate agreed on, and was at 200*l.* charge

[1] Only so much of the case is given as relates to compensation. — ED.

[2] In the following cases, in which the buyer would not have got substantially what he bargained for, the vendor's bill for specific performance was dismissed.

Substantial Deficiency in the Quantity of the Res. — Hick *v.* Phillips, Prec. Ch. 575 (buyer recovers his purchase money); Long *v.* Fletcher, 2 Eq. Ab. 5 pl. 4 (buyer recovers his purchase money); Fordyce *v.* Ford, 4 Bro. C. C. 494, 497 (*semble*); Drewe *v.* Corp, 9 Ves. 368; Stapylton *v.* Scott, 13 Ves. 425; Knatchbull *v.* Grueber, 1 Madd. 153; 3 Mer. 124; Roffey *v.* Shallcross, 4 Madd. 227; Dalby *v.* Pullen, 3 Sim. 29; Casamajor *v.* Strode, 2 M. & K. 706, 726; Peers *v.* Lambert, 7 Beav. 546; Hughes *v.* Jones, 3 D. F. & J. 307; Barton *v.* Downes, Fl. & K. 505; Prendergast *v.* Eyre, 2 Hog. 79, 81; Spunner *v.* Walsh, 11 Ir. Eq. R. 597; Hepburn *v.* Auld, 5 Cranch, 262; Beek *v.* Bridgman, 40 Ark. 382 (*semble*); Lombard *v.* Chicago Congregation, 64 Ill. 477; McKean *v.* Reed, Litt. S. C. 395; Buchanan *v.* Humphrey, 8 Humph. 516.

Defect in the Quality of the Res. — Leyland *v.* Illingworth, 2 D. F. & J. 248 (lack of spring water); Magennis *v.* Fallon, 2 Moll. 588 (seller destroys ornamental timber)

Substantial Incumbrance upon the Res. — Stewart *v.* Alliston, 1 Mer. 26; Collier *v.* Jenkins, Younge, 295; O'Kane *v.* Kiser, 25 Ind. 168; Winne *v.* Reynolds, 6 Paige, 407; Hinckley *v.* Smith, 51 N. Y. 21. — ED.

in building the works, and continued payment and tender of the rent, till of late the defendant Gower and the other defendant have made a subsequent agreement with some other person, &c.; therefore the plaintiff exhibited this bill to have an execution of the former agreement in specie.

The defendant Gower says he is only tenant for life, and subject to be called to account for waste, and therefore he could not execute this agreement, because 't is inconsistent with his power so to do, and that the other defendant told him that he was circumvented in this agreement.

The court decreed that Gower should execute this agreement in specie, as far as he was capable of doing it, and likewise shall satisfy the plaintiff such damages as he hath sustained in not enjoying the premises according to the agreement, and seal a lease for ten years, &c. Vide.

BARNES *v.* WOOD.

In Chancery, before Sir W. M. James, V. C., June 29, 1869.

[*Law Reports*, 8 *Equity*, 424.]

Sir W. M. James, V. C.[1] In this case the plaintiff seeks specific performance of a contract which he entered into with John Stringer. The contract whereby he undertook to sell the property in fee simple to the plaintiff was binding on John Stringer himself, but it turned out that John Stringer was not owner of the property in fee simple, but simply had an estate *pur autre vie*, with the possibility of a tenancy by the curtesy; the remainder, on the determination of the particular life, being vested in his wife, Betty Stringer. The wife did no act by which she was bound to ratify the contract. She was owner, and had the power, by certain means known to our law, of assenting to such a contract. She did not adopt those means, and therefore I must assume that she was in no way bound by the contract, and that her husband was under no obligation which this court recognizes to compel her to consent. In truth the wife was, in respect of this contract, a free agent and *sui juris*, because she could convey, and could convey only by those means which the law has provided for enabling her to act according to her own uncontrolled will. The position of matters, therefore, is just the same as if the vendor had been tenant for life, with remainder to any other person in the world with whom he had no connection. In that state of things, the defendant comes in, and with full knowledge of the contract which the plaintiff has made, makes a fresh contract with the tenant for life and the person entitled to the remainder, and takes a conveyance from them of the

[1] Only the judgment of the court is given. — Ed.

estate. It is said, that having known of the contract with the plaintiff he is bound to give effect to the whole of that contract out of the estate which he has acquired by conveyance both from the tenant for life and the person interested in remainder. I do not think that the plaintiff's case can be carried to that extent. I do not think that the purchaser from the wife of her interest is in any way bound by the equity of a contract which did not affect that estate in the hands of the wife. The wife is not obliged to convey. Her estate is in no way bound by the equity of the contract with the plaintiff, and the present purchaser from her takes it in exactly the same position as she held it. That, however, is not the whole of the plaintiff's case. He says, that if he cannot get from the purchaser, any more than from the wife, the interest which she had to convey, he ought, at least, to get the husband's interest, which the purchaser took with full knowledge of his (plaintiff's) contract, and that he has the same equity against the purchaser that he had against the husband. I think that is so. The question is, whether, supposing the defendant had not intervened, and a simple bill had been filed against Stringer and wife, praying the same relief as here, viz.: a conveyance of the fee simple by the husband and wife, or if the wife declined to concur, then a conveyance of the husband's interest, with compensation, whether the plaintiff would not have been entitled to the second branch of the relief prayed. On that point two cases were cited, one on each side. In Thomas *v.* Dering,[1] it seems to have been thought that the difficulty of making a valuation would be an insuperable objection to the enforcement of the rule that where a vendor has only a limited interest in the estate contracted to be sold, and cannot perform the whole contract, the purchaser is entitled to have the contract performed to the extent of the vendor's interest, with compensation for the deficiency. In Nelthorpe *v.* Holgate,[2] however (in which Thomas *v.* Dering was cited), relief was given under circumstances which appear to be exactly the same as here, except in this one respect, that there the person making the contract had the remainder subject to a life interest, and here a life interest only, which makes no difference in the case. The husband here represented himself to be owner of the fee, being, in fact, only entitled to the limited interest I have mentioned. The purchaser entered into his contract with the husband in total ignorance of the state of the title, and without any knowledge that the husband could only sell with the concurrence of his wife. The husband, therefore, is bound to convey all the interest that he has, according to the principle of the authorities that have been cited, and the court must endeavor to find out, in the best way it can, what compensation is to be made in respect of the interest which he is unable to convey. The plaintiff is therefore entitled to relief according to the second part of his prayer, and the defendant must pay the costs of the suit. Refer-

[1] 1 Keen, 729.
[2] 1 Coll. 203.

ence to Chambers to ascertain what compensation should be given to the plaintiff for the interest of Betty Stringer.[1]

[1] The buyer's right to insist upon specific performance with compensation for what the seller could not give him is generally recognized, whether there is a deficiency in the quantity or quality of the *res*, or whether it is subject to an incumbrance, provided that the buyer supposed at the time of the bargain that the seller was in a position to give him all that he bargained for. Atty.-Gen. *v.* Day, 1 Ves. Sr. 218, 224; Bolingbroke's Case, 1 Sch. & Lef. 19 n. (a), 2 Ph. 605, cited, s. c.; Mortlock *v.* Bullen, 10 Ves. 292, 316 (see comments upon this case by Lord Manners, C., in O'Rourke *v.* Percival, 2 Ba. & Be. 58, 60); Dale *v.* Lister, 16 Ves. 7 (cited); Milligan *v.* Cooke, 16 Ves. 1; Hill *v.* Buckley, 17 Ves. 394; Graham *v.* Oliver, 3 Beav. 124, 128; Sutherland *v.* Briggs, 1 Hare, 26, 34; Nelthorpe *v.* Holgate, 1 Coll. 203; Jones *v.* Evans, 17 L. J. Ch. 469; Peacock *v.* Penson, 11 Beav. 355; Great West. Co. *v.* Birmingham Co., 2 Ph. 597, 605; Price *v.* Griffith, 1 D. M. & G. 80, 84 (*semble*); Wilson *v.* Williams, 3 Jur. N. S. 810; Ramsden *v.* Hirst, 4 Jur. N. S. 200; Hughes *v.* Jones, 3 D. F. & J. 307, 315 (*semble*); Whittemore *v.* Whittemore, 8 Eq. 603; Hooper *v.* Smart, 18 Eq. 683; McKenzie *v.* Hesketh, 7 Ch. D. 675; Horrocks *v.* Rigby, 9 Ch. D. 180; Oceanic Co. *v.* Sutherbury, 16 Ch. Div. 236, 246; Burrow *v.* Scammell, 19 Ch. D. 175; Leslie *v.* Crommelin, Ir. R. 2 Eq. 134; Connor *v.* Potts, 1897, 1 Ir. 534; Pratt *v.* Law, 9 Cranch, 456; Townsend *v.* Vanderworker, 160 U. S. 171; Bass *v.* Gilliland, 5 Ala. 761; Bell *v.* Thompson, 34 Ala. 633; Bogan *v.* Daughdrill, 51 Ala. 312; Bonner *v.* Little, 38 Ark. 398; Marshall *v.* Caldwell, 41 Cal. 611; Swain *v.* Burnett, 76 Cal. 299; Cochrane *v.* Justice Co., 16 Colo. 415; Knox *v.* Spratt, 23 Fla. 64, 66 (*semble*); Seegar *v.* Smith, 78 Ga. 616; Phinizy *v.* Guernsey, 111 Ga. 346; McConnell *v.* Brillhart, 17 Ill. 354, 363; Lancaster *v.* Roberts, 144 Ill. 213; Wilson *v.* Brumfield, 8 Blackf. 146; Wingate *v.* Hamilton, 7 Ind. 73; McConnell *v.* Dunlap, Hardin, 41; Jones *v.* Shackleford, 2 Bibb, 410; Morgan *v.* Boone, 4 Monr. 291; Pingree *v.* Coffin, 12 Gray, 288, 316; Covell *v.* Cole, 16 Mich. 223; Mathews *v.* Patterson, 3 Miss. 729; Wilson *v.* Cox, 50 Miss. 133; Chambliss *v.* Person, 77 Miss. 806; Luckett *v.* Williamson, 31 Mo. 54; Lounsbury *v.* Locander, 25 N. J. Eq. 554; Borden *v.* Curtis, 48 N. J. Eq. 120; Keator *v.* Brown, 57 N. J. Eq. 600; Waters *v.* Travis, 9 Johns. 450; Morss *v.* Elmendorf, 11 Paige, 277, 287; Wiswall *v.* McGowan, Hoff. Ch. 125; Bostwick *v.* Beach, 103 N. Y. 414; Palmer *v.* Gould, 144 N. Y. 671, 675; Voorhees *v.* DeMeyer, 2 Barb. 37, 3 Sandf. Ch. 614; Gibert *v.* Peteler, 38 Barb. 488; Jacobs *v.* Locke, 2 Ired. Eq. 286; Henry *v.* Liles, 2 Ired. Eq. 407; Ketchum *v.* Stout, 20 Oh. 453, 459; Lucas *v.* Scott, 41 Oh. St. 636, 640; Erwin *v.* Myers, 46 Pa. 96, 106; Napier *v.* Darlington, 70 Pa. 64; Harbers *v.* Gadsden, 6 Rich. Eq. 284; Collins *v.* Smith, 1 Head, 251; Mullins *v.* Aiken, 2 Heisk. 535; Moses *v.* Wallace, 7 Lea, 413; Austin *v.* Ewell, 60 Tex. 253; Clark *v.* Reins, 12 Gratt. 98; Dunsmore *v.* Lyle, 87 Va. 391, 393; Stockton *v.* Union Co., 4 W. Va. 273; Morgan *v.* Brast, 34 W. Va. 332; Docter *v.* Hellberg, 65 Wis. 415.

In Wheatley *v.* Slade, 4 Sim. 126, and Chicago Co. *v.* Durant, 44 Minn. 211, it was intimated that a decree for specific performance and compensation ought not to be made against a vendor when he can convey only a relatively small proportion of the subject-matter of the bargain. But such a decree was given in Jones *v.* Evans, 17 L. J. Ch. 469 (seller had only $\frac{2}{21}$ of the *res*); Oceanic Co. *v.* Sutherbury, 16 Ch. Div. 236, 246 ($\frac{1}{4}$ of the *res*); Bass *v.* Gilliland, 5 Ala. 761 ($\frac{1}{2}$ of the *res*); Bogan *v.* Daughdrill, 51 Ala. 312 ($\frac{1}{2}$ of the *res*); Napier *v.* Darlington, 70 Pa. 64 ($\frac{2}{3}$ of the *res*). See, also, Burrow *v.* Scammell, 19 Ch. D. 175, 183.

In the following cases partial performance with compensation was refused because it would work injustice against third persons interested in the property. Thomas *v.* Dering, 1 Keen, 728, 748 (affirmed by the Lord Chancellor — see per Wood, V. C., in Wilson *v.* Williams, 3 Jur. N. S. 810); Westmacott *v.* Robins, 4 D. F. & J. 390; Cato *v.* Thompson, 9 Q. B. D. 616, 618. — ED.

A, with an estate pur autre vie, contracted to give fee. Held: Must give what he got.

CASTLE *v.* WILKINSON.

In Chancery, before Lord Hatherley, C., and Sir G. M. Giffard, L. J., March 23, 1870.

[*Law Reports*, 5 *Chancery Appeals*, 534.]

Ann Richardson, the wife of the defendant, Benjamin Richardson, was equitably entitled as tenant in fee simple to an undivided moiety of certain lands in Yorkshire; and by an agreement dated the 5th of October, 1863, and made between Benjamin Richardson and his wife of the one part, and the plaintiff, R. Castle, of the other part, Richardson and his wife agreed to sell, and R. Castle to purchase, "All that the moiety or equal half part of the said B. Richardson, and Ann his wife, in right of the said Ann Richardson," of and in the lands above-mentioned, "and the freehold and inheritance thereof in fee simple, freed from all charges and incumbrances," for £600; and by the agreement provisions were made for the execution of the deed of conveyance and for the acknowledgment by Ann Richardson. Richardson and his wife alleged that they were not bound by this agreement, and refused to convey.

On the 7th of September, 1864, Richardson and his wife executed a deed of conveyance of the same moiety of the lands to the defendant Wilkinson, in consideration of £550, and the deed was duly acknowledged by Ann Richardson.

The bill in this suit was filed by Castle against Wilkinson and Richardson, charging that the agreement of the 5th of October, 1863, was binding on Richardson so far as related to his estate and interest in the moiety comprised therein, and ought to be specifically performed with such abatement of the purchase money as the court should deem just; that the conveyance of 1864 was a fraud upon the plaintiff, and that the defendant Wilkinson was bound to give effect to the agreement of 1863. And the bill prayed for relief accordingly.[1]

Lord Hatherley, L. C., after stating the facts of the case, continued: —

The only question however is, whether this bill for specific performance can be maintained to the extent of holding that Richardson shall part with all the interest he can part with, namely, his estate for the joint lives of himself and his wife, and his estate by curtesy, with an abatement of the purchase money. Now, I apprehend that the law is settled as to this upon the authorities referred to by Lord St. Leonards,[2] that if a man professes to be owner of the fee simple, and undertakes to sell the fee simple, and it turns out that he had not power so to do, the purchaser not being at the time aware of the

[1] The statement of the case is abridged slightly and the arguments of counsel are omitted. — Ed.

[2] Sug. V. & P. 14th ed. ch. 8, § 1.

difficulty, then the vendor must convey as much as he can, and submit to an abatement. But the case is wholly different where the vendor does not profess to sell the fee, but only that estate which he is able to dispose of. Here, on the face of the agreement, the husband and wife intended to sell, and the purchaser knew that he was contracting with them for the estate of the wife, and that he could only get what the wife was willing to convey; and there is no authority at all approaching to such a proposition as it has been necessary to contend for here, that the husband can be compelled to part with his partial interest in the estate, the agreement being by him and his wife to convey the whole.

The latest authority, Barnes *v.* Wood, before Vice-Chancellor James, is in strict conformity with the other authorities, as indeed one might well expect it to be, namely, that where a man proposes to convey the whole of an estate, as owner of the fee simple, and it turns out that he is only entitled *pur autre vie*, and that his wife has the remainder, there the court can insist on his making good his contract to the extent to which he is able to make it good, and he must submit to an abatement of the consideration to be paid for that which he improperly alleged he was capable of selling. Since the case of Emery *v.* Wase,[1] the whole matter has been settled, and as the purchaser has chosen to file this bill with a full knowledge of the law and facts, his bill must be dismissed with costs as against Wilkinson, and without costs as against Richardson.

Sir G. M. Giffard, L. J.:—

In this case the attempt made by this bill is to enforce specific performance of a contract between a husband and wife and the purchaser; the purchaser not being misled in the slightest degree by anything appearing upon the face of the contract, because the contract states plainly and clearly upon the face of it, not that Richardson is entitled to the fee simple, but that he is entitled to the land in right of his wife, and that the fee simple is in truth in his wife.

That being so, it is the unquestionable law of this court that such a contract cannot be enforced either partially or wholly. All those cases in which the contract has been enforced partially and a partial interest has been ordered to be conveyed, have been where the vendor has represented that he could sell the fee simple, and the purchaser has been induced by that representation to believe that he could purchase the fee simple. Here it is quite clear that the purchaser never could have believed for one moment that he could purchase the fee simple; and that being so, the bill must be dismissed. For myself I should have thought the law too clear for argument.[2]

[1] 5 Ves. 846.

[2] Nelthorpe *v.* Holgate, 1 Coll. 203, 222 (*semble*); Edwards *v.* Marjoribanks, 3 De G. & J. 329, 1 Giff. 384; Beeston *v.* Stutely, 27 L. J. Ch. 156; James *v.* Litchfield, 9 Eq. 51; Carroll *v.* Keayes, Ir. R. 8 Eq. 97; Weatherford *v.* James, 2 Ala. 170; Jackson *v.* Torrence, 83 Cal. 521 (compare Olson *v.* Lovell, 91 Cal. 507); Knox *v.* Spratt, 23 Fla. 64; Chicago Co. *v.* Durant, 44 Minn. 211; Peeler *v.* Levy, 26 N. J. Eq. 330; Palmer *v.* Gould, 144 N. Y. 671; Fortune *v.* Watkins, 94 N. Ca. 304, 315 (*semble*); Lucas *v.* Scott, 41 Oh. St. 636 *Accord.*

RIESZ'S APPEAL.

SUPREME COURT, PENNSYLVANIA, APRIL 1, 1873.

[73 *Pennsylvania Reports*, 485.]

THE opinion of the court was delivered, May 17th, 1873, by SHARSWOOD, J.[1] It is not proposed to enter upon an examination and review of the cases which have been decided in England and our sister states upon the question presented upon this appeal. Great industry and ability have been exhibited by the learned counsel on both sides, in their printed and oral arguments, and it is but just to say that no suggestion or authority appears to have escaped them. But we consider the point as definitely settled in this state in the opinion of Chief Justice Gibson, in Clarke *v.* Seirer,[2] recognized and affirmed as it has been in many subsequent cases: Riddlesberger *v.* Mintzer;[3] Shurtz *v.* Thomas;[4] Bitner *v.* Brough;[5] Hanna *v.* Phillips;[6] Weller *v.* Weyand.[7] These cases settle, if any amount of authority can settle anything, that in Pennsylvania specific performance of an agreement to sell real estate will not be decreed against a vendor who is a married man, and whose wife refuses to join in the conveyance so as to bar her dower, unless, indeed, the vendee is willing to pay the full purchase money, and accept the deed of the vendor without his wife joining.[8] The policy of these decisions is very manifest. The wife is not to be wrought upon by her love for her husband, and sympathy in his situation, to do that which her judgment disapproves as contrary to her interest; nor is he to be tempted to use undue means

In Barker *v.* Cox, 4 Ch. D. 464, partial performance and compensation were given to the buyer, although he was aware that the seller's wife had a life interest in the property, on the ground that the seller expressly undertook to procure "a proper assurance by all necessary parties."

In James *v.* Litchfield, *supra*, the possession of a tenant was held to operate as constructive notice to the purchaser of all the rights of the tenant in regard to the property sold. The same rule was applied in Carroll *v.* Keayes, Ir. R. 8 Eq. 97, and Franz *v.* Norton, 75 Ill. 100. But the doctrine of James *v.* Litchfield was questioned by the court in Caballero *v.* Hentz, 9 Ch. 447, 449, 450. See, also, Phillips *v.* Miller, L. R. 10 C. P. 420, 427, 429, and Fry, Sp. Perf. (3d ed.) 564 n. 3.

If the seller is unable to convey all that he agreed to sell, he may be compelled in all cases to convey what he has, if the purchaser is willing to pay him the full contract price. The buyer's knowledge of the state of the seller's title at the time of the bargain is, in such cases, immaterial. Western *v.* Russell, 3 V. & B. 187; Neale *v.* McKenzie, 1 Keen, 474; Bennett *v.* Fowler, 2 Beav. 302; Barrett *v.* Ring, 2 Sm. & G. 43; St. Louis Co. *v.* Beidler, 45 Ark. 17; Harding *v.* Parshall, 56 Ill. 219; Litsey *v.* Whittemore, 111 Ill. 267; Lancaster *v.* Roberts, 144 Ill. 213; Morse *v.* Seibold, 147 Ill. 318; Cottrell *v.* Cottrell, 81 Ind. 87; Wetherell *v.* Brobst, 23 Iowa, 586; Brown *v.* Ward, 110 Iowa, 123; Anderson *v.* Kennedy, 51 Mich. 467; Jones *v.* Gieske (Montana, 1901), 63 Pac. R. 1042; Burk's Ap. 75 Pa. 141; Harrigan *v.* McAleese (Pa. 1888), 16 Atl. R. 31. — ED.

[1] Only the opinion of the court is given. — ED.

[2] 7 Watts, 107. [3] 7 Watts, 143. [4] 8 Barr, 363.

[5] 1 Jones, 138. [6] 1 Grant, 256. [7] 2 Id. 102.

[8] The master reported that "there was no evidence that the wife was consulted about the contract of sale, but with knowledge of it had not expressed opposition to it." — ED.

to procure her consent. The vendor must be left in such cases to his action at law to recover damages. The principles upon which damages are recovered, and the measure of them, under different circumstances in such an action, are well explained in Bitner *v.* Brough.[1]

The same sound policy which forbids a decree for the execution of a deed by the husband — to be enforced by his imprisonment if he cannot obey — prevents any decree looking to compensation, abatement, or indemnity. The case does not fall within the principle of those decisions, where the vendor who cannot make title to all he has contracted to convey, is held to be not thereby relieved from specific performance as far as in his power; but shall be compelled to execute his contract with a reasonable abatement in the price. The right of dower of the widow is of such a contingent nature, depending as it does as well upon her surviving her husband, as on her continuance in life after his death, that no abatement in the price can be made which will be just to both parties, without in effect making a new contract for them; a contract which, perhaps in the first instance, neither party would have come into, certainly not the vendor. Receipt of the purchase money in full may have been the main object of the sale to enable him to pay debts or carry out other plans. If he is to be subjected to serious pecuniary loss by his wife's refusal to join, it will operate almost as powerfully as the peril of his imprisonment, as a moral coercion and compulsion upon her to yield her consent, instead of that free will and accord which the law jealously requires her to declare by an acknowledgment upon an examination before a magistrate, separate and apart from her husband. The learned master, Mr. Clay, to whom it was referred to report what amount of the purchase money should be retained by the vendee upon mortgage, as a compensation for him for any claim the wife might thereafter make against the premises for dower, reported that in his opinion not less than forty per cent. of the price should be left in his hands for that purpose; a result no doubt just as to him, but how as to the vendor, who was personally in no default? No stronger argument could be adduced to show the impolicy of making any decree. Specific performance is a matter of grace, and these are considerations which address themselves powerfully to the conscience of the chancellor.

Decree reversed.[2]

[1] 1 Jones, 127.

[2] Barbour *v.* Hickey, 2 Dist. Col. Ap. 207; Humphrey *v.* Clement, 44 Ill. 299; Ebert *v.* Arends, 190 Ill. 221; Plume *v.* Mitchell (Ky. 1894), 26 S. W. R. 391; Hawralty *v.* Warren, 18 N. J. Eq. 124; Reilly *v.* Smith, 25 N. J. Eq. 158; Flaharty *v.* Blake (N. J. Eq. 1887), 10 Atl. R. 158; Blake *v.* Flatley, 44 N. J. Eq. 228; Borden *v.* Curtis, 48 N. J. Eq. 120, 128, 129; McCormick *v.* Stephany, 57 N. J. Eq. 257, 266 (see, however, Young *v.* Paul, 10 N. J. Eq. 391 — in which case the wife's refusal to release her dower was induced by the connivance of the husband, he will be compelled to convey, making compensation or giving indemnity to the buyer); Sternberg *v.* McGovern, 56 N. Y. 12; Martin *v.* Colby, 42 Hun, 1; Roos *v.* Lockwood, 59 Hun, 181; Bennet *v.* Babbage, 19 N. Y. Sup. 934 (but see Peters *v.* De la Plaine, 49 N. Y. 362, 368; Bostwick *v.* Beach, 103 N. Y. 414); Fortune *v.* Watkins, 94 N. Ca. 304, 315; Lucas *v.* Scott, 41 Oh. St. 636; Hanna *v.* Phillips, 1 Grant (Pa.), 253; Burk's Ap. 75 Pa. 141; Burk *v.* Serrill, 80 Pa. 413, 414; Hill *v.* Jones, 152 Pa. 433, 436; Graybill *v.* Brugh, 89 Va. 895 *Accord.*

RUDD *v.* LASCELLES.

In Chancery, before Farwell, J., March 14, 1900.

[*Law Reports* [1900], 1 *Chancery*, 815.]

Witness Action.

The facts proved were as follows: —

The contract was an open contract contained in a correspondence between the plaintiff and defendant in 1899, whereby the defendant agreed to sell the property to the plaintiff for 3500*l.*

There was no representation as to the title the defendant could make to the property, nor as to the nature of her interest, nor any provision for compensation for defects. On the investigation of the

But in the following cases the husband was obliged to convey his interest and to make compensation to the buyer to the extent of the value of the wife's interest: Wilson *v.* Williams, 3 Jur. N. S. 810; Springle *v.* Shields, 17 Ala. 295; Wingate *v.* Hamilton, 7 Ind. 73; Hazelrig *v.* Hutson, 18 Ind. 481; Martin *v.* Merritt, 57 Ind. 34; Troutman *v.* Gowing, 16 Iowa, 415; Leach *v.* Forney, 21 Iowa, 271; Zebley *v.* Sears, 38 Iowa, 507; Miller *v.* Nelson, 64 Iowa, 458; Hession *v.* Linastruth, 96 Iowa, 483; Park *v.* Johnson, 4 All. 259; Woodbury *v.* Luddy, 14 All. 1; Davis *v.* Parker, 14 All. 94; Walker *v.* Kelly, 91 Mich. 212; Sanborn *v.* Nockin, 20 Minn. 178; Wright *v.* Young, 6 Wis. 127 *Contra.*

In Wilson *v.* Williams, *supra*, Sir W. P. Wood, V. C., said, p. 810: "Here the vendor has only a partial interest, and it was known to the purchaser that the wife had already refused to release her dower; but then he asked that very question, and received an answer that she would release. One obvious observation upon this question of compensation is that which pressed Lord Redesdale in Lawrenson *v.* Butler[1] and Harnett *v.* Yielding,[2] viz., the disadvantage under which the vendor would lie for want of mutuality if it were to be held that the purchaser could enforce the contract with a compensation; whereas the vendor never could force the completion upon a purchaser, even by submitting to a deduction for compensation; so that there is no mutuality. At the same time, however, it is to be observed, that the court has gone a long way in favor of a vendor on the point of mutuality. According to the observations in Mortlock *v.* Buller,[3] this court has allowed a vendor, who has contracted without any title at all, to sustain a bill if he can acquire a good title before the report on the decree, and to take steps, even pending litigation, to perfect his title, even by going so far as to obtain a private act of parliament for that purpose. In such cases there would have been no mutuality, for the purchaser could have had no decree against the vendor in the absence of all title; so that the vendor alone had the sole power of determining whether the contract should be carried out or not. Here the vendor, having a good title, except as to this right of dower, assured the purchaser at the time of the contract that that right would be released. He gets the contract upon that footing. Can it be said that there is any hardship on the contractor in calling upon him, if he cannot literally make good his assurance, at all events to make it good as far as he can? It occurred to me that the case of dower might be such an interest as to make it difficult to calculate what abatement ought to be made in respect of it — whether there was such a difficulty as was felt in the case of White *v.* Cuddon,[4] before the House of Lords. In this case, however, there is very little difficulty beyond what was found in Nelthorpe *v.* Holgate,[5] the only additional circumstance being, that it is here uncertain whether the wife will ever claim, for she may die before her husband; and that contingency may be very easily provided for by simply directing a sufficient portion of the purchase money to be set aside, allowing the vendor to receive the interest during the joint lives of himself and his wife, and the principal upon her decease. In considering the propriety of enforcing the contract, it is not immaterial to see whether there is an easy way of getting an indemnity." See, also, Barker *v.* Cox, 4 Ch. D. 464. — Ed.

[1] 1 Sch. & Lef. 13.
[2] 2 Sch. & Lef. 553.
[3] 10 Ves. 292.
[4] 8 Cl. & Fin. 766.
[5] 1 Coll. 203.

title it appeared that the property was subject to restrictive covenants as to building and user contained in a deed of October 9, 1876.

The defendant, who had derived the property from her late husband, was, to the knowledge of the plaintiff, practically ignorant as to her title, the deeds being in the hands of mortgagees. She was quite unaware of the existence of any restrictive covenants.

The plaintiff alleged that the restrictive covenants depreciated the value of the property to the extent of 1000*l.*, and claimed specific performance with compensation. Being unable to develop the property as he intended, he was only willing to pay 2500*l.*, being twenty years' purchase of the rental value of the property in its present state, namely, 125*l.* per annum. He stated that he had lost a resale at an advance of 1000*l.*, solely on the ground of the restrictive covenants.[1]

FARWELL, J. It is plain that the purchaser was aware of the vendor's ignorance as to her own title, and that there was no representation by the vendor leading the purchaser to suppose he would get an absolute fee simple. I am asked to decree specific performance with compensation. I adhere to what I said in Hexter *v.* Pearce [2] to the effect that a court of equity will grant the equitable remedy of specific performance in all cases "unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or in some rare instances where there would be a great hardship imposed on an innocent grantor or lessor by reason of some mistake which he has made, although the other party has not contributed to it." In that case both parties contracted with their eyes open, the subject-matter was existing, and there was no question of compensation. But in this case, if I grant specific performance I shall decree specific performance not of the contract made by the parties, but of a new contract made for them by the court. To adopt the language of Lord Langdale, M. R., in Thomas *v.* Dering:[3] "It is impossible not to see that the cy-près execution of the contract which is given in these cases is in fact the execution of a new contract which the parties did not enter into, in which there is no mutuality, and in which there are no adequate means of ascertaining the just price." In the present case the bargain between the parties contains no provision for compensation, such as is now common in conditions of sale. Cases where there is such a provision do not present so much difficulty because compensation is part of the bargain. But here nothing of the sort was contemplated, and if I enforce the contract with compensation I am compelling the vendor to perform a contract into which she did not enter.

In my opinion the jurisdiction to enforce specific performance with compensation on a vendor, where the contract is silent as to compensation, rests on the equitable estoppel referred to in Mortlock *v.* Buller,[4]

[1] The arguments are omitted.—ED.
[2] 1900, 1 Ch. 341, 346.
[3] 1 Keen, 729, 746; 44 R. R. 158.
[4] 10 Ves. 292, 315; 7 R. R. 417.

namely, that a vendor representing and contracting to sell an estate as his own cannot afterwards be heard to say he has not the entirety. It probably first arose in cases of small deficiency in the quantity of the land sold; *e. g.*, if a vendor contracted to sell 100 acres and only had 90 acres, he could not resist specific performance on the ground that the contract was to sell 100 acres. This cy-près execution was a purely equitable remedy. This view is borne out by the judgment of Giffard, L. J., in Castle *v.* Wilkinson: "All those cases in which the contract has been enforced partially and a partial interest has been ordered to be conveyed, have been where the vendor has represented that he could sell the fee simple, and the purchaser has been induced by that representation to believe that he could purchase the fee simple." In the present case there is obviously no direct representation of that kind, and though a mere offer to sell real property *primâ facie* implies that the vendor has the unincumbered fee simple therein, still, if the purchaser, as in this case, knows that the vendor is ignorant as to the title, he cannot set up any such implication as a representation inducing the contract. The present case, therefore, does not come within the above category.

But I am not compelled to decide the case on that ground alone; there is a further ground which depends on a dictum of Jessel, M. R., in Cato *v.* Thompson,[1] a dictum, I need not say, of very great weight. One ground for refusing specific performance with compensation is the great difficulty of properly assessing the compensation, and in Cato *v.* Thompson, in which there were restrictive covenants like those in the present case, and the purchaser brought an action to recover his deposit, Jessel, M. R., said in answer to an argument that the purchaser ought to complete with compensation: "Now, in the first place, this is not a case for enforcing specific performance on a purchaser with compensation. It is almost impossible to assess compensation for covenants of this nature. I think that the cases of specific performance with compensation ought not to be extended. In many of them a bargain substantially different from that which the parties entered into has been substituted for it and enforced, which is not right. I think this not a case for compensation."

I entirely and respectfully agree with every word of this statement. In my opinion the court should confine this relief to cases where the actual subject-matter is substantially the same as that stated in the contract, and should not extend it to cases where the subject-matter is substantially different. In the present case specific performance with compensation could not be enforced on the purchaser, as there was no provision that he should accept compensation, and the defect by his own showing is substantial, and so substantial that if he succeeded in this action he would not be getting that which he thought he had contracted to buy. He says in his second requisition: "The restrictions must be released so as to allow the purchaser to use the vacant land at the back of the houses in any way he may think proper,

[1] 9 Q. B. D. 616, 618.

the purchase having been made solely for the purpose of developing the vacant land. The purchaser has agreed to give a much higher price for the property than he would have done had he known of the restrictive and other covenants contained in the conveyance of October 9, 1876."

Further, the compensation could not be fairly ascertained. If I am to make a new contract for the parties, I must see that it is at a fair price; but I do not ascertain this if I merely find out what would be the value of the property if it were subject to no restrictions, and how much less it is worth because of the restrictions. It would be necessary to find out further what the purchaser would have given and what the vendor would have taken for it under the altered conditions. Now, according to the plaintiff's own showing, he has lost a resale at an advance of 1000*l.*, and, as he puts the compensation at 1000*l.*, it looks as if he had contracted to give the right price for the property as it stands. How then can I assume that the purchaser would not still give 3500*l.*? I must not make any bargain that might be unjust to either party. The proposed new bargain would be extremely hard on the vendor. She sells on the basis of income, and she has contracted to sell property producing 125*l.* a year for 3500*l.*, and, if the purchaser is right, she is to lose about one third of the purchase money. It would be a great hardship to enforce the contract against her with so large an abatement in respect of covenants which do not affect her enjoyment, and I cannot assume that she would have sold for such a reduced sum. The case really comes under the principle of Earl of Durham *v.* Legard,[1] where the actual acreage was about half the acreage stated in the contract, and the purchaser was held not entitled to specific performance with a proportionate abatement of the price.

There is no case that contravenes the dictum of Jessel, M. R., in Cato *v.* Thompson.[2] Ramsden *v.* Hirst[3] has no bearing, as there was an express provision for compensation, under which quite different considerations arise. Powell *v.* Elliot[4] was a vendors' suit for specific performance in which the purchasers filed a cross-bill alleging, as I read it, innocent misrepresentation entitling them to rescission, and alternatively wilful misrepresentation entitling them to compensation by way of damages. It resembles the case of a man keeping an article purchased, and getting damages for misrepresentation. I do not think the other cases cited have much bearing. Barnes *v.* Wood seems at first sight to go a long way in the plaintiff's favor, but it does not govern the present case. The true ground of the decision was explained in Castle *v.* Wilkinson, namely, that the vendor in Barnes *v.* Wood proposed to convey the whole of the estate, as owner of the fee simple. This was a representation which he was liable to make

[1] 34 Beav. 611.
[2] 9 Q. B. D. 616, 618.
[3] 4 Jur. (N. S.) 200.
[4] L. R. 10 Ch. 424.

good. There is no such representation here, and I dismiss the action with costs.

At the request of *Bramwell Davis, Q. C.*, the contract was rescinded.[1]

[1] Because of the difficulty of fixing the proper compensation partial performance with compensation was not given in the following cases. Thomas *v.* Dering, 1 Keen, 729 (*semble*); Westmacott *v.* Robins, 4 D. F. & J. 390; Lord Brooke *v.* Rownthwaite, 5 Hare, 298 (suit by the vendor); Magennis *v.* Fallon, 2 Moll. 561, 584; Humphrey *v.* Clements, 44 Ill. 299; Ebert *v.* Arends, 190 Ill. 221; Evans *v.* Kingsbury, 2 Rand. 120; Clark *v.* Reins, 12 Gratt. 98.

See Ramsden *v.* Hirst, 4 Jur. N. S. 290, in which case the difficulty was not insurmountable. — ED.

SECTION V.

Consideration.

(*a*) *Necessity of Consideration.*

JEFFERYS *v.* JEFFERYS.

In Chancery, before Lord Cottenham, C., February 1, 1841.

[*Craig & Phillips*, 139.]

John Jefferys executed certain indentures of lease and release in September, 1834, whereby, in consideration of the natural love and affection which he had for his three daughters, he conveyed certain freehold hereditaments and covenanted to surrender certain copyhold hereditaments to Bowden and Thorn in trust for the benefit of his daughters. John Jefferys died in September, 1836, not having surrendered the copyholds.

In July, 1837, this bill was filed by his two surviving daughters, praying that their mother, in whom the copyholds had become vested, might be compelled to surrender them pursuant to their father's covenant.[1]

The Lord Chancellor. The title of the plaintiffs to the freehold is complete; and they may have a decree for carrying the settlement into effect so far as the freeholds are concerned. With respect to the copyholds, I have no doubt that the court will not execute a voluntary contract; and my impression is, that the principle of the court to withhold its assistance from a volunteer applies equally, whether he seeks to have the benefit of a contract, a covenant, or a settlement. As, however, the decision in Ellis *v.* Nimmo is entitled to the highest consideration, I will not dispose of this case absolutely, without looking at a former case,[2] in which I had occasion to refer to that decision. Unless I alter the opinion I have expressed, the bill must be dismissed with costs, so far as the copyholds are concerned.[3]

On this day his lordship said he had looked at the case alluded to, and that he saw no reason for altering the opinion he had before expressed.

1 The statement of the case is abridged, and the arguments are omitted. — Ed.

2 Dillon *v.* Coppin, 4 My. & Cr. 647.

3 Fursaker *v.* Robinson, Prec. Ch 475 (consideration stated, but none in fact); Williamson *v.* Codrington, 1 Ves. Sr. 511, 514; Hervey *v* Audland, 14 Sim. 531; Callaghan *v.* Callaghan, 8 Cl. & F. 374; Houghton *v.* Lees, 1 Jur. N. S. 862, 863; Tatham *v.* Vernon, 29 Beav. 604; Barrett *v.* Geisinger, 179 Ill. 240, 249; Black *v* Cord, 2 Har. & G. 100; Lamprey *v.* Lamprey, 29 Minn. 151 (consideration stated, but none in fact); Vasser *v.* Vasser, 23 Miss. 378, 382; Tunison *v.* Bradford, 49 N. J. Eq. 210; Graybill *v.* Brugh, 89 Va. 855 (consideration stated, but none in fact) *Accord.*

The following cases *contra* are no longer law. Wiseman *v.* Roper, 1 Ch. Rep. 158; Beard *v.* Nuttall, 1 Vern. 427; Husband *v.* Pollard, 2 P. Wms. 467 (cited); Edwards *v* Warnick, 2 P. Wms. 171, 176; Wycherley *v.* Wycherley, 2 Eden, 175, 177, 178. — Ed.

C. FERRY *v.* D. STEPHENS AND OTHERS.

COURT OF APPEALS, NEW YORK, JUNE 6, 1876.

[66 *New York Reports*, 321.]

SPECIFIC PERFORMANCE. By a contract in writing, dated March 10, 1862, the plaintiff agreed to buy and Vincent Stephens, her brother, agreed to sell, certain premises in Hornellsville for $1100, payable in instalments, the conveyance to be executed upon the payment of the last instalment. It was not intended by either party that anything should be paid by the plaintiff to her brother, the transaction being put into the form of a contract in order to conceal from their brothers and sisters the real intention of making and receiving a gift of the premises. The plaintiff never paid any part of the alleged consideration, but Vincent, on April 18, 1862, indorsed upon the contract a receipt in full of the purchase price.

In June, 1862, Vincent died, having devised these premises to his brother Delevan Stephens.

The court finding that the said contract, being a mere voluntary executory promise to give lands to the plaintiff, gave judgment for the defendant, which was reversed by the General Term.[1]

ANDREWS, J. The judgment of the Special Term cannot be sustained on the ground upon which it was placed, and the action is brought to enforce the specific performance of a voluntary agreement for the conveyance of land. There was no want of consideration for the promise of Vincent Stephens to convey the land. The promise of the plaintiff to pay the purchase price was a valid consideration for the promise of the other party. The agreement was in writing, signed by both parties, and was mutually obligatory. It is quite immaterial, in the absence of fraud or mistake, neither of which is claimed, what object or intention the parties may have had at variance with the terms of the agreement, or that both understood that the vendor would not exact the payment of the purchase money, or that he intended to give the land to his sister. The contract did not operate as a gift of the land, and the intention to give the land could only be consummated by an actual conveyance, and the intention to make a present gift is conclusively rebutted by the covenant which the vendor took for the payment of the consideration. The parol understanding between the parties would be no answer to a suit brought by the vendor to enforce the performance of the plaintiff's promise to pay the purchase money. The suit was not, therefore, as the learned judge of the special term seemed to suppose, brought to enforce a voluntary executory promise to give the land to the plaintiff. Vincent Stephens became, on the execution of the contract of sale, a trustee

[1] The statement of the case is abridged, and the arguments as well as a part of the opinion are omitted. —ED.

for the plaintiff of the land, having a lien for the purchase money, and she became his debtor for the consideration.

That the receipt was intended as a gift of the debt is clearly inferrible from the facts found. His primary intention was to give her the land. The gift of the debt would not give her the legal title, but it gave her the whole beneficial interest, provided it operated as a legal satisfaction of her promise. The case of Gray *v.* Barton,[1] is a decisive authority for the plaintiff on this question. The plaintiff does not, in this case, seek the aid of the court to perfect an incomplete gift. The gift of the debt was complete upon the execution of the receipt. The vendor's purpose of giving the land has never been executed, only so far as it results from his giving the plaintiff the debt for the purchase money. The plaintiff's obligation under the contract having been satisfied, the only unperformed stipulation remaining is that of the vendor to convey the land, and this action is brought to enforce that stipulation.

The judgment of the General Term should be affirmed, and judgment absolute for the plaintiff ordered on the stipulation.

All concur.

Order affirmed and judgment accordingly.

SECTION VI (*Continued*).

(*b*) *Adequacy of Consideration.*

BURROWES *v.* LOCK.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., MARCH 5, 1805.

[10 *Vesey*, 470.]

EDWARD CARTWRIGHT, being entitled under a will to the ninth part of the residue of the testator's personal estate, the whole of which had been distributed, except an outstanding debt, and being pressed by the plaintiff for a debt due to him in his trade, as a baker, in consideration of 132*l.* executed an assignment to the plaintiff of his share of what remained due on account of the residue, amounting to 288*l.* The expense of the transaction, amounting to 10*l.*, was also paid by the plaintiff. Previously to this assignment the plaintiff consulted Lock, the trustee of the fund; who represented Cartwright as being entitled to the full sum of 288*l.*; though he had ten years

[1] 55 N. Y. 68.

before created an incumbrance to the extent of a tenth part of the fund by an assignment to his brother.

Under these circumstances the bill was filed against Cartwright, and Lock, who admitted notice of the prior incumbrance, when he made the representation to the plaintiff; alleging as an excuse that he forgot the circumstance.[1]

The MASTER OF THE ROLLS: —

As to the merits, I do not know, if fraud is out of the case, that I can set aside this contract, or refuse to act upon it, merely on the ground of inadequacy of price. But it is not quite so inadequate as it has been represented. The difference is not to be taken to be merely between the two sums. But after all the allowances that can be made, I have no difficulty in believing this was an inadequate bargain as to the price; that the defendant did not get the price the property assigned was fairly worth. But, taking that to be so, the contract cannot be set aside within any principle this court has ever acted upon, not even within the principle of the Roman law, requiring that the price should exceed half the value.[2]

[1] The arguments and a part of the judgment are omitted. — ED.

[2] "I never can agree that inadequacy of consideration is *in itself a principle* upon which a party may be relieved from a contract, which he has wittingly and willingly entered into. It may indeed be a strong *evidence* of fraud, when the transaction is such as to be inconsistent with the sober manner of a man's conducting his affairs. When you see distress on the one side and money on the other, and a wish on the one side to press that distress into a submission to his own terms, inadequacy of price goes a great way in warranting the court to infer from this that some sort of fraud was used to draw the other party into the bargain; it may be such an ingredient of fraud as to make the court presume more than is in actual proof; and I shall never quarrel with a court of equity which makes such an inference, where the inadequacy is so gross as makes it impossible that the bargain could have been fairly made." Per Lord Chief Baron Eyre in Griffith *v.* Spratley, 1 Cox, 383, 388, 389.

"Unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance." Per Lord Eldon in Coles *v.* Trecothick, 9 Ves. 234, 246.

The cases generally accord with the view of Sir William Grant, Lord Eldon, and Eyre, C. B. Thomson *v.* Harcourt, 2 Bro. P. C. (Toml. ed.) 415; Adams *v.* Weare, 1 Bro. C. C. 567; Griffith *v.* Spratley, 1 Cox, 383; Collier *v.* Brown, 1 Cox, 428; White *v.* Damon, 7 Ves. 30 (*semble*); *Ex parte* Latham, 7 Ves. 35 n. (auction); Coles *v.* Trecothick, 9 Ves. 346; Underhill *v.* Horwood, 10 Ves. 209; Lowther *v.* Lowther, 13 Ves. 95, 103; Callaghan *v.* Callaghan, 8 Cl. & F. 374, 401; Bower *v.* Cooper, 2 Hare, 408 (*semble*); Borell *v.* Dann, 2 Hare, 450 (auction); Haywood *v.* Cope, 25 Beav. 140; Harrison *v.* Guest, 8 H. L. C. 481, 6 D. M. & G. 424; Abbott *v.* Sworder, 4 DeG. & Sm. 448; Welles *v.* Gallard, 21 L. T. Rep. 655; Cathcart *v.* Robinson, 5 Pet. 263 (*semble*); Franklin Co. *v.* Harrison, 145 U. S. 459, 472; Garnett *v.* Macon, 2 Brock. 185; Clure *v.* Clure, 82 Ala. 581; Ayer *v.* Baumgartner, 15 Ill. 444 (auction); Weston Co. *v.* Babcock, 6 Met. 346; Lee *v.* Kirby, 104 Mass. 420; New England Co. *v.* Abbott, 162 Mass. 148, 155; O'Brien *v.* Boland, 166 Mass. 481; Burkle *v.* Hogge, Harringt. Ch. 31; Bean *v.* Valle, 2 Mo. 126; Harrison *v.* Town, 17 Mo. 237; Rodman *v.* Zilley, Saxt. 320; Ready *v.* Noakes, 29 N. J. Eq. 497 (auction); Shaddle *v.* Desbrough, 30 N. J. Eq. 370; Underhill *v.* Van Cortlandt, 2 Johns. Ch. 339 (valuation by arbitrators); Seymour *v.* De Lancey, 3 Cow. 445 (reversing s. c. 6 Johns. Ch. 222); Westervelt *v.* Matheson, 1 Hoff. Ch. 37; Viele *v.* Troy Co., 21 Barb. 381; White *v.* Thompson, 1 Dev. & B. Eq. 493; Fripp *v.* Fripp, Rice, Eq. 84; Curtin *v.* Hendricks, 35 Tex. 225; Hale *v.* Wilkinson, 21 Grat. 75; White *v.* McGannon, 29 Grat. 511; Stearns *v.* Beckham, 31 Grat. 379, 390; Smith *v.* Henkel, 81 Va. 524 *Accord*.

Savile *v.* Savile, 1 P. Wms. 744; Underwood *v.* Hitchcox, 1 Ves. Sr. 279 (*semble*); Day *v.* Murman, 2 Cox, 77, 10 Ves. 301, cited, s. c.; Tilly *v.* Peers, 10 Ves. 301, cited; Falcke

Lock must be answerable, in case Cartwright cannot answer the demand; and must first pay over to the plaintiff the residue of the trust fund, deducting the 10*l.* per cent.: then Cartwright must make up the deficiency; and, if he fails, Lock must make it good. But under the circumstances of undervalue I will not give costs against Cartwright.

v. Gray, 4 Drew. 651, 664 (*semble*); Morrill *v.* Everson, 77 Cal. 115 (statutory); Prince *v.* Lamb, 128 Cal. 120 (statutory); Thayer *v.* Young, 86 Ind. 259; Clements *v.* Reid, 17 Miss. 535 (*semble*); Clitherall *v.* Ogilvie, 1 Dess. 250, 257; Gasque *v.* Small, 2 Strob. Eq. 72 *Contra.* — Ed.

SECTION VI.

Marketable Title.

STAPYLTON *v.* SCOTT.

In Chancery, before Lord Eldon, C., July 21, 1809.

[16 *Vesey*, 272.]

An exception was taken to the master's report in favor of the title of the defendants to the premises, for the purchase of which the plaintiff had contracted.[1] The objection arose upon the will of the testator, John Nicholson; devising his undivided moiety or half part of the dwelling-house, etc. and all his other shares, proportions, and interest, if any, in the premises to the defendants upon trust to sell.

The Lord Chancellor [Eldon].[2] The habit of this court formerly was, not to refuse the decree for a specific performance, upon the ground that the title was doubtful. The Court, relying on its own opinion in favor of the title, would not admit any doubt, detracting from the value of that opinion; and the notion was very generally entertained that the true way of getting rid of the difficulty arising from any doubt was by an appeal to the House of Lords. The course has, however, varied entirely; and it has been held repeatedly that, though in the judgment of the court the better opinion is that a title can be made, yet, if there is a considerable, a rational doubt, the court has not attached so much credit to its own opinion as to compel a purchaser to take the title, but leaves the parties to law. The first modern case of that sort was, I believe, Shapland *v.* Smith,[3] in which Mr. Hett differed from Baron Eyre; and the opinion of the former was confirmed by Lord Thurlow, who, however, felt the doubt so forcibly that he refused a specific performance, and unquestionably in many instances since that time it has been refused, where there was reasonable doubt upon the title.[4]

The doubt in general cases has been not of the same nature as this,

[1] Stapylton *v.* Scott, 13 Ves. 425.

[2] The argument for plaintiff and a portion of the judgment are omitted. — Ed.

[3] 1 Bro. C. C. 175.

[4] "It has been said that every title is good or bad; and the court ought to know nothing of a doubtful title: but the court has adopted a different principle of decision. It was not first introduced by Lord Thurlow, but is at least as old as Sir Joseph Jekyll's time, and was repeatedly acted upon by Lord Hardwicke." Per Sir William Grant, M. R., in Sloper *v.* Fish, 2 V. & B. 145, 149.

"I quite agree that a purchaser ought not to be compelled to take such a title as on reasonable ground might be litigated; but then there must be a reasonable, decent probability of litigation." Per Alderson, B., in Corrall *v.* Corrall, 4 Y. & C. 228, 237. — Ed.

but upon matter of law respecting the title: yet, if there is as rational a doubt whether in this instance the testator had the entirety of the premises, as if the title was affected by an objection of law, I cannot see the ground for a different principle. Considering this question, first, generally, without the special circumstances, it appears that the testator, John Nicholson, who became the owner of the entirety, in 1781, made his will in 1801, devising these premises by express description as one undivided moiety; and, instead of describing the other moiety, he devises all his other shares, proportions, and interest, if any, not asserting that he has any, to trustees to sell; and it appears by a subsequent instrument, on which, however, I do not lay much stress, that the same description followed in each of those subsequent conveyances. Taking the principle to be that a purchaser shall have a reasonably clear title, can this be so represented? Admitting that it may be explained by extrinsic circumstances that the testator's doubt can be accounted for, the true question is, whether this is a reasonably clear, marketable title, without that doubt as to the evidence of it, which must always create difficulty in parting with it. I am satisfied that it is not.[1]

[1] It is well settled that equity will not force a doubtful title upon a purchaser. Marlow *v.* Smith, 2 P. Wms. 198; Shapland *v.* Smith, 1 Bro. C. C. 75, 76 *(semble)*; Cooper *v.* Denne, 1 Ves. Jr. 565, 4 Bro. C. C. 80 s. c.; Sheffield *v.* Musgrave, 2 Ves. Jr. 526; Crewe *v.* Dicken, 4 Ves. 97; Rose *v.* Calland, 5 Ves. 186; Roake *v.* Kidd, 5 Ves. 647; Braybrooke *v.* Skip, 8 Ves. 417, 427; Vancouver *v.* Bliss, 11 Ves. 458; Lowes *v.* Lust, 14 Ves. 547; Wheate *v.* Hall, 17 Ves. 80; Biscoe *v.* Perkins, 1 V. & B. 485, 492 *(semble)*; Sloper *v.* Fish, 2 V. & B. 145; Eyton *v.* Dicken, 4 Price, 303; Marshall *v.* Bonsfield, 2 Madd. 166, 175; Hartley *v.* Smith, Buck, 368; Smith *v.* Death, 5 Madd. 371; Jervoise *v.* Northumberland, 1 J. & W. 539; Price *v.* Strange, 6 Madd. 159, 164; Hall *v.* Dewes, Jac. 189; Blosse *v.* Clanmorris, 3 Bligh, 62; Cann *v.* Cann, 1 S. & S. 284; Willcox *v.* Bellaers, T. & R. 491; Sharp *v.* Adcock, 4 Russ. 374; Cattell *v.* Corrall, 4 Y. & C. 228, 237; Lincoln *v.* Arcedeckne, 1 Coll. 98; Briston *v.* Wood, 1 Coll. 480; Glass *v.* Richardson, 9 Hare, 698, 701; Collard *v.* Sampson, 4 D. M. & G. 224 (reversing s. c. 16 Beav. 453; Freer *v.* Hesse, 4 D. M. & G. 495; Wrigley *v.* Sykes, 21 Beav. 337, 348 *(semble)*; Rogers *v.* Waterhouse, 4 Drew, 329; Sykes *v.* Sheard, 33 L. J. Ch. 181; Falkner *v.* Equitable Society, 4 Drew. 352, 358 *(semble)*; Cook *v.* Dewson, 3 D. F. & J. 130; Bull *v.* Hutchens, 32 Beav. 615, 619 *(semble)*; Pegler *v.* White, 33 Beav. 403; Parker *v.* Tootal, 11 H. L. C. 143, 158 *(semble)*; Rede *v.* Oakes, 4 D. J. & S. 505; Collier *v.* McBean, 1 Ch. Ap. 81; Hamilton *v.* Buckmaster, 3 Eq. 323; Burnell *v.* Firth, 15 W. R. 546; Beidlay *v.* Carter, 4 Ch. 230 *(semble)*; Alexander *v.* Mills, 6 Ch. 124 *(semble)*; Radford *v.* Willis, 7 Ch. 7 (reversing s. c. 12 Eq. 105); Bell *v.* Holtby, 15 Eq. 178, 193; Forster *v.* Abraham, 17 Eq. 351; Osborne *v.* Rowlett, 13 Ch. D. 773, 781; Palmer *v.* Locke, 18 Ch. Div. 381; *Re* Tanqueray *v.* Williaume, 20 Ch. Div. 465 *(semble)*; *Re* Thackwray, 40 Ch. D. 34; Sheppard *v.* Doolan, 3 Dr. & War. 1, 8; Wesley *v.* Eells, 177 U. S. 370; Sohier *v.* Williams, 1 Curt. C. C. 479, 491; Chapman *v.* Lee, 55 Ala. 616, 620 *(semble)*; Linn *v.* McLean, 80 Ala. 360, 368; Snyder *v.* Spaulding, 57 Ill. 480, 486 *(semble)*; Hoyt *v.* Tuxbury, 70 Ill. 331, 336; Close *v.* Stuyvesant, 132 Ill. 607; Street *v.* French, 147 Ill. 342; Garden Co. *v.* Miller, 157 Ill. 225, 233; Harding *v.* Olson, 177 Ill. 298, 303; Smith *v.* Turner, 50 Ind. 367; Tewksbury *v.* Howard, 138 Ind. 103 *(semble)*; Stevenson *v.* Polk, 71 Iowa, 278 *(semble* — no reasonable doubt); Logan *v.* Bull, 78 Ky. 607 *(semble)*; Gill *v.* Wells, 59 Md. 492; Emmert *v.* Stouffer, 64 Md. 543; Second Society *v.* Dugan, 65 Md. 460; Lurman *v.* Fowler, 75 Md. 268, 272 *(semble)*; Seldner *v.* McCreery, 75 Md. 287; Foreman *v.* Wolf, (Md. 1894) 29 Atl. R. 837 *(semble)*; Gump *v.* Sibley, 79 Md. 166 *(semble)*; Levy *v.* Iroquois Co., 80 Md. 300, 304 *(semble)*; Erdman *v.* Corse, 87 Md. 506, 508 *(semble)*; Sturtevant *v.* Jaques, 14 All. 523; Richmon *v.* Gray, 3 All. 25; Hayes *v.* Harmony Society, 108 Mass. 400, 402 *(semble* — no reasonable doubt); Jeffries *v.* Jeffries, 117 Mass. 184; Cunningham *v.* Blake, 121 Mass. 333; Butts *v.* Andrews, 136 Mass. 221; Noyes *v.* Johnson, 139 Mass. 436; Chesman *v.* Cummings, 142 Mass. 65 (*semble* — but court will decide finally if all parties in interest are before the court); Dow *v.* Whitney, 147 Mass. 1, 7 (*semble* — no reasonable

doubt); First Society *v.* Brown, 147 Mass. 296, 298 (*semble* — no reasonable doubt as to facts); Batt *v.* Mallon, 151 Mass. 477, 480 (*semble* — no reasonable doubt); Hunting *v.* Damon, 160 Mass. 441; Cushing *v.* Spalding, 164 Mass. 287, 290 (*semble* — no reasonable doubt); Daniell *v.* Shaw, 166 Mass. 582; Loring *v.* Whitney, 167 Mass. 550; Gilman *v.* Gilman, 171 Mass. 46, 48 (*semble* — no reasonable doubt); Conley *v.* Finn, 171 Mass. 70, 72 (*semble* — no reasonable doubt); Chauncey *v.* Leominster, 172 Mass. 340; Martin *v.* Hamlin, 176 Mass. 180; Allen *v.* Atkinson, 21 Mich. 351, 361; Powell *v.* Conant, 33 Mich. 396; Bernard *v.* Brown, 112 Mich. 452 (*semble*); Ford *v.* Wright, 114 Mich. 122; Townshend *v.* Goodfellow, 40 Minn. 312; Fairchild *v.* Marshall, 42 Minn. 14, 18 (*semble* — no reasonable doubt); Hedderly *v.* Johnson, 42 Minn. 443, 445 (*semble*); Richmond *v.* Koenig, 43 Minn. 480; Corey *v.* Clarke, 55 Minn. 311; Morrison *v.* Kinstra, 55 Miss. 71, 76; Greffet *v.* Willman (Mo. 1893), 21 S. W. R. 459 (*semble* — no reasonable doubt); Ballou *v.* Sherwood, 32 Neb. 666, 695 (*semble*); Young *v.* Rathbone, 16 N. J. Eq. 224; Vreeland *v.* Blauvelt, 23 N. J. Eq. 483 (*semble* — no reasonable doubt); Dobbs *v.* Norcross, 24 N. J. Eq. 327; Tillotson *v.* Gessner, 33 N. J. Eq. 313; Cornell *v.* Andrews, 35 N. J. Eq. 7; 36 N. J. Eq. 34; Paulmier *v.* Howland, 49 N. J. Eq. 364; Cruikshank *v.* Parker, 52 N. J. Eq. 310 (reversing S. C. 51 N. J. Eq. 21, 28, *semble* — no reasonable doubt); Lippincott *v.* Wikoff, 54 N. J. Eq. 107 (*semble* — no reasonable doubt); Day *v.* Kingsland, 57 N. J. Eq. 134 (*semble* — no reasonable doubt); Hatt *v.* Rich, 59 N. J. Eq. 492 (*semble* — no reasonable doubt); Seymour *v.* Delancey, Hopk. Ch. 436; Jordan *v.* Poillon, 77 N. Y. 518; Kelso *v.* Lorillard, 85 N. Y. 177 (*semble* — no reasonable doubt); Shriver *v.* Shriver, 86 N. Y. 575; Hellreigel *v.* Manning, 97 N. Y. 56 (*semble* — no reasonable doubt); Fleming *v.* Burham, 100 N. Y. 1; Ottinger *v.* Strasburger, 33 Hun, 466, affirmed 102 N. Y. 692 (*semble* — no reasonable doubt); Palmer *v.* Morrison, 104 N. Y. 132; Moser *v.* Cochrane, 107 N. Y. 35 (*semble* — no reasonable doubt); Baylis *v.* Stimson, 110 N. Y. 621 (*semble* — no reasonable doubt); Abbott *v.* James, 111 N. Y. 673; Toole *v.* Toole, 112 N. Y. 333; Hayes *v.* Nourse, 114 N. Y. 595 (*semble* — no reasonable doubt); Moore *v.* Williams, 115 N. Y. 586, 593; Vought *v.* Williams, 120 N. Y. 253 (limiting Ferry *v.* Simpson, 112 N. Y. 415); Irving *v.* Campbell, 121 N. Y. 353; Cambrelleng *v.* Purton, 125 N. Y. 610 (*semble* — no reasonable doubt); Kilpatrick *v.* Barron, 125 N. Y. 751; Dingley *v.* Bon, 130 N. Y. 607; Greenblatt *v.* Hermann, 144 N. Y. 13 (*semble* — no reasonable doubt); McPherson *v.* Schade, 149 N. Y. 16; Kahn *v.* Chapin, 152 N. Y. 305 (*semble* — no reasonable doubt); Heller *v.* Cohen, 154 N. Y. 299; Simon *v.* Vanderveer, 155 N. Y. 377 (adverse claimant had filed a complaint good on its face — distinguishing Aldrich *v.* Bailey, 132 N. Y. 85, and Hayes *v.* Nourse, 114 N. Y. 595); Moot *v.* Business Men's Ass'n, 157 N. Y. 201 (*semble* — no reasonable doubt); Brokaw *v.* Duffy, 165 N. Y. 391; Kullman *v.* Cox, 167 N. Y. 411 (although 3 of 7 judges thought the title doubtful); Abrams *v.* Rhoner, 44 Hun, 507 (*semble*); Paolillo *v.* Taber, 56 N. Y. Ap. Div. 241; Motts *v.* Caldwell, Busb. Eq. 289; Batchelor *v.* Macon, 67 N. Ca. 181; Castlebury *v.* Maynard, 95 N. Ca. 281; Wilson *v.* Tappan, 6 Oh. 172, 174; Ludlow, *v.* O'Neil, 29 Oh. St. 181 (*semble* — no reasonable doubt); Tiffin *v.* Shawhan, 43 Oh. St. 178; Rife *v.* Lybarger, 49 Oh. St. 422 (*semble* — no reasonable doubt); Nicol *v.* Carr, 35 Pa. 381; Speakman *v.* Forepaugh, 44 Pa. 363; Swain *v.* Fidelity Co., 54 Pa. 455; Pratt *v.* Eby, 67 Pa. 396 (*semble*); Kostenbader *v.* Spotts, 80 Pa. 430; List *v.* Rodney, 83 Pa. 483 (doubt arising from possibility of a woman 75 years old having a child); Mitchell *v.* Steinmetz, 97 Pa. 251; Murray *v.* Ellis, 112 Pa. 485; Hermann *v* Somers, 158 Pa. 424; Batley *v.* Foerderer, 162 Pa. 460; Holmes *v.* Woods, 168 Pa. 330; Laurens *v.* Lucas, 6 Rich. Eq. 217 (*semble* — no reasonable doubt); Lowry *v.* Muldrow, 8 Rich. Eq. 240, 247; Butler *v.* O'Hear, 1 Dess. 382, 400; Webb *v.* Chisholm, 24 S. Ca. 487 (*semble* — no reasonable doubt); Collins *v.* Smith, 1 Head, 251; Scott *v.* Simpson, 11 Heisk. 310; Littlefield *v.* Tilsley, 26 Tex. 353; Estell *v.* Cole, 62 Tex. 695; Boggs *v.* Bodkin, 32 W. Va. 567.

A valuable note, containing numerous instances of defects, which have been held to render a title doubtful or unmarketable, will be found in 35 N. J. Eq. 7.

Title by Adverse Possession a Good Title. A seller may force upon a buyer a title acquired by adverse possession. Sands *v.* Thompson, 22 Ch. D. 614; Games *v.* Bonnor, 54 L. J. Ch. 517; Scott *v.* Nixon, 3 Dr. & War. 388, 405; Tewksbury *v.* Howard, 138 Ind. 103; Logan *v.* Bull, 78 Ky. 607; Lurman *v.* Fowler, 75 Md. 268; Foreman *v.* Wolf, Md. (1894), 29 Atl. R. 837; Gump *v.* Sibley, 79 Md. 166; Erdman *v.* Corse, 87 Md. 506; Conley *v.* Finn, 171 Mass. 70 (qualifying Noyes *v.* Johnson, 139 Mass. 436); Barnard *v.* Brown, 112 Mich. 452; Hedderly *v.* Johnson, 42 Minn. 443, 445; Ballou *v.* Sherwood, 32 Neb. 666, 695; Ottinger *v.* Strasburger, 33 Hun, 461, affirmed in 102 N. Y. 692; Abrams *v.* Rhoner, 44 Hun, 507; Pratt *v.* Eby, 67 Pa. 396; Boggs *v.* Bodkin, 32 W. Va. 567.

It was decided in a few cases at common law that the court must determine absolutely the validity of the title in an action to recover purchase money paid to the seller, without

PYRKE *v.* WADDINGHAM.

IN CHANCERY, BEFORE SIR G. J. TURNER, V. C., JUNE 29, 1850.

[10 *Hare*, 1.]

VICE-CHANCELLOR.[1] The bill in this case is filed by a vendor against a purchaser, for specific performance; and the question in the cause is, whether the vendor has shown such a title as the court will compel the purchaser to accept.

It is not disputed that the vendor has shown a good title, if, upon the true construction of the will of Thomas Pyrke, the testator, it is clear either that Joseph Watts, who, after the death of the testator, assumed the name of Pyrke, and became Joseph Pyrke the elder, took an estate tail in possession, or even in remainder expectant upon the estates given to his sons; or that the sons of Joseph Pyrke the elder, who had several sons, some of whom are yet living, took estates either in tail or in fee; or lastly, that the remainders in favor of Robert Pyrke and the Skippes are contingent, and not vested remainders: but the title of the vendor is questioned upon all these points.

It has now for so long a time been the settled rule of courts of equity not to compel a purchaser to accept a doubtful title, that it is quite unnecessary for me to make any observations upon that subject; but, in considering this case, I have found it necessary to look into the question, what titles are to be considered as doubtful within the meaning of this rule. ? Whether the rule applies only in those cases in which the court itself entertains doubts upon the title, or whether it extends further to cases in which, although the court itself may entertain an opinion in favor of the title, it is satisfied that that opinion may fairly and reasonably be questioned by other competent persons. I have, therefore, examined the cases upon this point; and, upon examining them, I do not think that the question is open to much doubt; for in Marlow *v.* Smith,[2] one of the earliest, and in Price *v.* Strange,[3] one of the latest cases on the subject, there are distinct opinions upon the question. In Marlow *v.* Smith, the then Master of the Rolls not merely expresses his own opinion against the title, but adds, and "there being the opinion of learned men against the title, I will not,

regard to the equitable rule as to doubtful titles. Canfield *v.* Gilbert, 4 Esp. 222; Materley *v.* Robbins, 5 Taunt. 625 (*semble*); Romilly *v.* James, 6 Taunt. 274; Boyman *v.* Gutch, 7 Bing. 379. But the rule at law is now the same as in equity. Curling *v.* Shuttleworth, 6 Bing. 121; Jeakes *v.* White, 6 Ex. 873; Simmons *v.* Heseltine, 5 C. B. N. S. 554; Hayes *v.* Nourse, 114 N. Y. 595, 606 (*semble*); Moore *v.* Williams, 115 N. Y. 586 (discrediting some decisions and *dicta* to the contrary); Brokaw *v.* Duffy, 165 N. Y. 391. See, also, Colwell *v.* Hamilton, 10 Watts, 413; Ludwick *v.* Huntzinger, 5 W. & S. 51; Swayne *v.* Lyon, 67 Pa 436.

In Anson *v.* Hodges, 5 Sim. 227, the plaintiff, failing to obtain specific performance, was ordered to refund the deposit. — ED.

[1] Only the judgment of the court is given. — ED.

[2] 2 P. Wms. 198.

[3] 6 Madd. 159, 164.

nor do I think it reasonable that a Court of Equity should, compel the purchaser to accept the purchase;" and in Price *v.* Strange, Sir John Leach, though he expressed his opinion in favor of the title, declined to compel the purchaser to accept it. There is also the case of Rose *v.* Calland,[1] in which I find the Lord Chancellor saying, "I should be in a strange situation in desiring a purchaser to take this title, because I think the point a good one, though the Court of Exchequer have determined against it. It is telling him to try my opinion at his expense." And these dicta and decisions seem to accord with the principle on which the rule appears to be founded; for it may be collected from what fell both from Lord Eldon and Lord Redesdale in Blosse *v.* Lord Clanmorris,[2] and afterwards from Lord Eldon in Lord Braybroke *v.* Inskip,[3] that the rule rests upon this, that every purchaser is entitled to require a marketable title; by which I understand to be meant, a title which, so far as its antecedents are concerned, may at all times, and under all circumstances, be forced upon an unwilling purchaser. I think, therefore, that in these cases it is the duty of the court not to have regard to its own opinion only, but to take into account what the opinion of other competent persons may be; and that this is the true rule to be applied in such cases is, I think, the more apparent, from the repeated decisions that the court will not compel a purchaser to take a title which will expose him to litigation or hazard, of which Cooper *v.* Denne,[4] Crewe *v.* Dicken,[5] Roake *v.* Kidd,[6] Sharp *v.* Adcock,[7] and Price *v.* Strange [8] may be mentioned as instances.

Such, then, being the rule by which the court is to be guided in enforcing or refusing to enforce specific performance in cases of this nature, it may well be asked by what scale are the doubts which may be entertained upon the title to be measured; and the cases, I think, throw some light upon this question also. If the doubts arise upon a question connected with the general law, the court is to judge whether the general law upon the point is or is not settled, enforcing specific performance in the one case, as in Moody *v.* Walters [9] and Biscoe *v.* Perkins;[10] and refusing to enforce it in the other, as in Blosse *v.* Lord Clanmorris [11] and Sloper *v.* Fish.[12] If the doubts arise upon the construction of particular instruments, and the court is itself doubtful upon the points, specific performance must of course be refused, as in Sheffield *v.* Lord Mulgrave,[13] Willcox *v.* Bellaers,[14] and Jervoise *v.* The Duke of Northumberland,[15] the doctrine in which case has been followed by the Vice-Chancellor Knight Bruce in The Earl of Lincoln *v.* Arcedeckne;[16] and even though the court may lean in favor of the title, its duty is either, as expressed by Lord Eldon in Jervoise *v.* The Duke of Northumberland, following in effect what had been said in Sheffield *v.* Lord Mulgrave, to consider whether it would trust its own

1 5 Ves. 186, 188.
2 3 Bligh, 62, 71.
3 8 Ves. 417.
4 4 B. C. C. 80.
5 4 Ves. 97.
6 5 Ves. 647.
7 4 Russ. 374.
8 6 Madd. 159.
9 16 Ves. 283, 312.
10 1 V. & B. 485, 493.
11 3 Bligh, 62.
12 2 V. & B. 145.
13 2 Ves. jun. 526, 529.
14 1 T. & R. 491, 495.
15 1 J. & W. 559, 569.
16 1 Coll. 98.

money upon the title, or, at least, as stated by the same learned judge in Lord Braybroke *v.* Inskip,[1] with reference to the doubt upon the legitimacy, to weigh whether the doubt is so reasonable and fair that the property would be left in the purchaser's hands not marketable. If the doubts which arise may be affected by extrinsic circumstances which neither the purchaser nor the court has the means of satisfactorily investigating, specific performance is to be refused, according to Lowes *v.* Lush,[2] Hartley *v.* Smith,[3] and Smith *v.* Death.[4]

It may be thought, perhaps, that if the court is of opinion in favor of the title a specific performance ought necessarily to be decreed; and the cases of Rushton *v.* Craven [5] and of Chorlton *v.* Craven,[6] mentioned in it, were cited in support of that position, as was also Clonmert *v.* Whitaker,[7] but in those cases the opinion of the court had been fortified by the opinion of a court of law; and, looking at the other cases to which I have referred, I cannot venture to hold that because this court is of opinion in favor of the title a purchaser is to be compelled to accept it. I think that each case must depend upon the nature of the objection, and the weight which the court may be disposed to attach to it; and that, in determining whether specific performance is to be enforced or not, it must not be lost sight of that the exercise by the court of its jurisdiction in cases of specific performance is discretionary; and that, as was observed in Cooper *v.* Denne, and Sheffield *v.* Lord Mulgrave, the court has no means of binding the question as against adverse claimants, or of indemnifying the purchaser, if its own opinion should ultimately turn out not to be well founded.

It remains for me only to apply these principles to the present case.

The question upon this title depends, I think, principally, if not wholly, upon the construction of this particular will, and not upon any general rule of law. I have fully considered the questions, and the authorities which were referred to in the argument. My opinion, I do not hesitate to say, is much in favor of the title, more especially upon the point as to the remainders being contingent; but I find myself unable to base that opinion upon any general rule of law, or upon any reasoning so conclusive as fully to satisfy my mind, that other competent persons may not entertain a different opinion, or that the purchaser, if compelled to take the title, might not be exposed to substantial and not merely idle litigation, or even that he would be free from all possible hazard. Upon these grounds, therefore, I am of opinion that a specific performance ought not in this case to be decreed; and I am the more strongly of that opinion, because I think that, in cases of this nature, where titles may be affected by rights which may hereafter arise, it is the duty of the court to consider how it would act if those rights had actually arisen, and were in the course of active litigation; and I am satisfied that, if the questions which may arise upon this title were now in active litigation between the

[1] 8 Ves. 428. [2] 14 Ves. 547. [3] Buck's B. Cas. 368. [4] 5 Madd. 371, 372.
[5] 12 Price, 599. [6] Cited id. 619. [7] 2 Jarm. Wills, 373.

plaintiff and adverse claimants, I should not feel myself justified in disregarding that litigation, and decreeing a specific performance during its pendency.

It was pressed in argument that, if I should arrive at this conclusion, a case might be directed; but, the defendant objecting to that course, the plaintiff has no right to insist upon a case. The court refused to send a case both in Rooke *v.* Kidd, in Willcox *v.* Bellaers, and in Sharp *v.* Adcock; and in Sheffield *v.* Lord Mulgrave, where a case had been directed, the court refused to act upon the certificate against the purchaser. I take the rule of the court upon this subject to be, that it will not, against a purchaser, send a case upon a doubtful question of law, any more than it will direct an inquiry upon a doubtful question of fact, and for the same reason, that adverse claimants would not be bound by the result.

The conclusion, therefore, at which I have arrived is, that this bill must be dismissed. I repeat, that I dismiss it, not from any opinion against the title, — my opinion being in favor of it, — but upon the grounds which I have stated. The bill being dismissed, I must give the defendant the costs. The case of Blosse *v.* Clanmorris is, I think, decisive upon that point.[1]

[1] In Mullings *v.* Trinder, 10 Eq. 449, Lord Romilly, M. R., compelled a purchaser to accept the same title which Turner, V. C., deemed too doubtful to force upon a buyer. It is to be observed, however, that Lord Romilly in deciding for the plaintiff had the support of Sir George Turner's opinion in favor of the title.

In Alexander *v.* Mills, 6 Ch. 124, 131, James, L. J., said: "We do not say that there may not be cases in which a question of law may be considered so doubtful that a court would not, on its own view, compel a purchaser to take a title; still as a general and almost universal rule, the court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined. The exceptions to this will probably be found to consist not in pure questions of legal principle, but in cases where the difficulty and doubt arise in ascertaining the true construction and legal operation of some ill-expressed and inartificial instrument.

"This case involves a question of general law applicable to all similar settlements, and we are bound to say one way or the other what the law is, and we cannot in such a case escape from that duty by saying that the decision of the Master of the Rolls, in taking one view, makes the other view, if held by us, so doubtful that we cannot force it on a purchaser. The contrary was expressly laid down by our predecessors in the case of Beidlay *v.* Carter, 4 Ch. 230, adopting the language of Lord St. Leonards in the case of Shepherd *v.* Doolan there cited."

In Palmer *v.* Locke, 18 Ch. Div. 381, 388, Lord Selborne said: "When you have a question raised upon the proper construction of a general statute, if there is any reasonable ground for saying that that question is not determined by previous authorities, or that the previous authorities are conflicting, then, in the terms of Lord Justice Turner's judgment in Pyrke *v.* Waddingham, that cannot be treated as a question of general law so settled as to exclude that kind of question which the court has paid regard to when it sees there is a doubtful question of title which cannot be forced upon a purchaser. It is not at all necessary to inquire whether the case of Alexander *v.* Mills did or did not overrule some previous decisions which might have tended to draw a line as to what was or was not a title to be forced upon a purchaser more strictly than it was drawn in Alexander *v.* Mills, but I do not understand that the general doctrine, as laid down by a long series of decisions of judges of the greatest eminence, and determined before Pyrke *v.* Waddingham, and which was explained in Pyrke *v.* Waddingham, has been displaced by subsequent authorities. When the court finds, according to the principle explained in that case, that there is a question open to doubts of the kind there mentioned, and that a title ought not to be forced upon the purchaser, it is neither necessary, nor generally convenient or desirable, that the

court, whatever may be the opinion it has formed upon the question, and on the materials presented in a suit for specific performance, should think that that should conclude all questions as against persons who are not before it. Therefore it is enough to consider whether there are not serious grounds for doubting that the title of Elford's mortgage ought to be considered to be a thing in which the purchaser had no concern. There do appear to me to be such serious grounds."

In *In re* Thackwray, 40 Ch. D. 34, 38, Chitty, J., said: "I take it as a general principle of law with regard to specific performance, that the court does decide on general matters of law about which there cannot be fairly said to be any judicial doubt. In regard to this question, which of late years has undergone a good deal of consideration as to titles which the court will or will not force upon a purchaser, it has been laid down by James, L. J., in Alexander *v.* Mills, 6 Ch. 124, 131, that with regard to general matters of law, including the construction of a general Act of Parliament, the right course for the court is to decide the question. But then I think it must appear to the judge who decides it that there are no decisions or *dicta* of weight which show that another judge or another court having the question before it might come to a different conclusion. The court, I take it, must feel such confidence in its own opinion as to be satisfied that another court would not adopt another conclusion."

In Lippincott *v.* Wikoff, 54 N. J. Eq. 107, 120, Emery, V. C., referring to the English cases cited in this note, said: "These decisions of Lord Selborne and Mr. Justice Chitty qualify, to some extent, the broad doctrine laid down in Alexander *v.* Mills, that, with regard to general principles of law, including the construction of a general statute, it is the duty of the court to decide it on a suit for specific performance, and the doctrine as thus qualified is that specific performance should not be decreed if there is reasonable ground for saying that the question is not settled by previous authorities, or if there are decisions or *dicta* of weight which show that another judge or another court having the question before it might come to a different conclusion. This rule is, as it seems to me, sufficiently favorable for the protection of the purchaser, and it is equitable to apply it in the present case." See, also, Chesman *v.* Cummings, 142 Mass. 65, 67, per Devens, J.; Hedderly *v.* Johnson, 42 Minn. 443, 445, per Gilfillan, C. J., and Richmond *v.* Koenig, 43 Minn. 480, 482, per Collins, J. — Ed.

SECTION VII.

The Statute of Frauds — Part Performance — Fraud.

Statute 29 Charles II., Chapter III., Section 4.

[8 *Statutes at Large*, 405.]

IV. And be it further enacted by the authority aforesaid, —

That no action shall be brought . . . (3) to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some *memorandum* or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

VISCOUNTESS MONTACUTE *v.* SIR G. MAXWELL.

In Chancery, before Lord Parker, C., Easter Term, 1720.

[1 *Peere Williams*, 618.]

The plaintiff brought a bill against the defendant her husband, setting forth that the defendant before her intermarriage with him did promise that she should enjoy all her own estate to her separate use, that he had agreed to execute writings to that purpose, and had instructed counsel to draw such writings, and that when they were to be married, the writings not being perfected, the defendant desired this might not delay the match, in regard his friends being there it might shame him: but engaged that upon his honor she should have the same advantage of the agreement, as if it were in writing drawn in form by counsel and executed; upon which the marriage took effect, and afterwards the plaintiff wrote a letter to the defendant her husband, putting him in mind of his promise, to which the defendant her husband wrote her an answer under his hand, expressing that he was always willing she should enjoy her own fortune as if sole, and that it should be at her command.

To this bill the defendant pleaded the statute of frauds and perjuries by which "all promises in consideration of marriage, unless signed in writing by the party, are made void;" and averred that he never signed any promise or agreement before marriage for her en-

Equity will not give effect to a promise where there is a writing required by statute (e.g. Statute of Frauds) even to prevent fraud.

joying any part of her estate separately, which he pleaded in bar of any relief or discovery.

It was urged against the plea, that this promise was on the plaintiff's side executed by her intermarriage; and therefore like the several cases in which equity did relieve, and compel a mutual execution; that the letter written by the defendant, though after marriage, was an evidence under his hand of the agreement before the marriage, and so took it out of the statute.

On the other side, it was said that the express words of the statute made all such promises in consideration of marriage void, unless they were in writing signed by the parties; and that there was the greatest reason for it, since in no case could there be supposed so many unguarded expressions and promises used, as in addresses in order to marriage, where many passages of gallantry usually occur, and it was therefore provided by the statute that all promises made in consideration of marriage should be void unless signed by the party. That it was very wrong to call *marriage* the execution of the promise, when until the marriage it was not within the statute; and the statute makes the promise in consideration of marriage void; therefore to say that the marriage was an execution which should render the promise good was quite frustrating the statute; which the court took notice of and approved.

Lord Chancellor: In cases of fraud, equity should relieve, even against the words of the statute: as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former, in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere; nor were the instructions given to counsel for preparing the writings material, since after they were drawn and engrossed the parties might refuse to execute them, and as to the letter, it consists only of general expressions; as "that the estate should be at the plaintiff's command or at her service;" indeed had it recited or mentioned the former agreement and promised the performance thereof, it had been material. But as this case is circumstanced, allow the plea.[1]

[1] Spurgeon *v.* Collier, 1 Eden, 55, 61; Dundas *v.* Dutens, 1 Ves. Sr. 196, 199 (*semble*); Reading *v.* Wilkes, 3 Bro. C. C. 400; Randall *v.* Morgan, 12 Ves. 67, 71; Lassence *v.* Tierney, 1 Mac. & G 551; Warden *v.* Jones, 2 De G. & J. 76; Cooper *v.* Wormald, 7 W. R. 402; Caton *v.* Caton, 1 Ch. Ap. 137; Johnston *v.* Mappin, 60 L. J. Ch. 241; *In re* Holland, 1901, 2 Ch. 145; McAskee *v.* McCoy, 2 Ir. R. Eq. 447 (*semble*); Crow *v.* Campbell, L. R. 10 Vict. Eq. 126; Lloyd *v.* Fulton, 91 U. S. 479; Andrews *v.* Jones, 10 Ala. 400, 420; Peck *v.* Peek, 77 Cal. 106 (*semble*); McAnnulty *v.* McAnnulty, 120 Ill. 26; Richardson *v.* Richardson, 148 Ill. 563; Keady *v.* White, 168 Ill. 76; Flenner *v.* Flenner, 29 Ind. 564; Green *v.* Green, 34 Kan. 740 (*semble*); Petty *v.* Petty, 4 B. Mon. 215 (*semble*); Crane *v.* Gough, 4 Md. 316; Albert *v.* Ross, 5 Md. 66; 2 Md. Ch. 169; Deshon *v.* Wood, 148 Mass. 132; Wood *v.* Savage, 2 Doug. (Mich.) 316; Welch *v.* Whelpley, 62 Mich. 15; Manke *v.* Manke, 75 Mich. 435 (*semble*); Manning *v.* Riley, 52 N. J. Eq. 39; Reade *v.* Livingston, 3 Johns. Ch. 481; Dygert *v.* Remerschnider, 32 N. Y. 629; Borst *v.* Carey, 16 Barb. 136; Brown *v.* Conger, 8 Hun, 625; Lamb *v.* Lamb, 18 N. Y. Ap. Div. 250 (*semble*); Whyte *v.* Denike, 53 N. Y. Ap. Div. 320; Hunt *v.* Hunt, 55 N. Y. Ap. Div. 430; Finch *v.* Finch, 10 Oh. St.

LORD PENGALL *v.* ROSS.

In Chancery, before Lord Cowper, C., 1709.

[2 *Equity Abridgment*, 46, *placitum* 12.]

A. agreed with B. to make him a Lease for 21 Years of Lands, rendring Rent, B. paying A. 150*l.* Fine. B. paid 100*l.* in Part to A.'s Agent, which A. knew of, and ordered his Agent to prepare the Lease; but before it was executed, A. repented and refused to grant the Lease. B. having paid 100*l.* Earnest, exhibited his Bill for a specifick Performance.

L. Chan. The Payment of this 100*l.* is not such a Performance of the Agreement on one Part as to decree an Execution on the other; for the Statute of Frauds makes one Sort of Contracts, viz., Personal Contracts good if any Money is paid in Earnest. Now that Statute says, that no Agreement concerning Lands shall be good except it is reduced into Writing; and therefore a parol Agreement, as it is in this Case, cannot be good within the Statute by giving Money in Earnest; for there must be something more than a bare Payment of Money on the one Part to induce the Court to decree a Performance on the other Part, either by putting it out of the Party's Power to undo the Thing, or where it would be a Prejudice to the Party performing his part, as beginning to build, or letting the other into Possession, &c., in such Case where the Agreement hath proceeded so far on one Part, the Statute never intended to restrain this Court from decreeing a Performance of the other. But he would not put the Plaintiff to his Action to recover his 100*l.*, wherefore decreed it to be refunded.[1]

501; Henry *v.* Henry, 27 Oh. St. 101; Adams *v.* Adams, 17 Oreg. 247; Izard *v.* Izard, Bail. Eq. 228; Davidson *v.* Graves, Riley, Eq. 219; Smith *v.* Greer, 3 Humph. 118; Hackney *v.* Hackney, 8 Humph. 452; Hannon *v.* Hounihan, 85 Va. 429 *Accord.*

In Caton *v.* Caton, *supra*, Lord Cranworth, C., said, p. 147: "That marriage is no part performance within the rule of equity is certain. Marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity."

Nowack *v.* Berger, 133 Mo. 24 (*semble*) *Contra.*

If the marriage was brought about by the fraud of the promisor, equity will give specific reparation for the fraud by compelling a conveyance of the land promised. Mullet *v.* Halfpenny, Prec. Ch. 404 (cited); Cookes *v.* Mascall, 2 Vern. 200; Dundas *v.* Dutens, 1 Ves. Sr. 196, 199; Wood *v.* Midgley, 5 D. M. & G. 750 (*semble*); Caton *v.* Caton, 1 Ch. Ap. 137; Peek *v.* Peek, 77 Cal. 106; Green *v.* Green, 34 Kan. 740; Petty *v.* Petty, 4 B. Mon. 215. Compare Hackney *v.* Hackney, 8 Humph. 452. — Ed.

[1] Lord Hardwick's opinion that payment of any part of the purchase money (Lacon *v.* Martins, 3 Atk. 1; Owen *v.* Davies, 1 Ves. Sr. 82, 83), and also the opinion of other judges that payment of the whole or a substantial part of the purchase money (Dickinson *v.* Adams, 4 Ves. 722, cited; Main *v.* Melbourne, 4 Ves. 720. See Seagood *v.* Meale, Prec. Ch. 560) was such part performance as to take the case out of the Statute of Frauds, have been superseded. The present rule is clearly expressed by Cotton, L. J., in Britain *v.* Rossiter, 11 Q. B. Div. 123, 131: "It is well established and cannot be denied that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th sect." See to the same effect Frame *v.* Dawson, 14 Ves. 386, 388; Watt *v.* Evans, 4 Y. & C. 579; Dale *v.* Hamilton, 5 Hare, 369, 381; Hughes *v.* Morris, 2 D. M. & G. 349, 356; Maddison *v.* Alderson, 8 App. Cas. 467,

SMITH *v.* HATCH.

Supreme Court, New Hampshire, July, 1865.

[46 *New Hampshire Reports*, 146.]

Indebitatus Assumpsit, for land sold, and for money had and received.

The plaintiff's evidence tended to show that the plaintiff and defendant made a parol agreement, by which the plaintiff was to convey to the defendant a tract of wild land in part payment for a farm which the defendant was to convey to plaintiff; that the defendant was to allow $125 for the wild land in part payment for the farm, and that, if he should get more than $25 by sale of the wild land, he was to allow what he should get; that plaintiff had conveyed the wild land

478-479, 489; Humphreys *v.* Green, 10 Q. B. Div. 148, 159; Clinan *v.* Cook, 1 Sch. & Lef. 22, 40; Purcell *v.* Miner, 4 Wall. 513; Duff *v.* Hopkins, 33 Fed. R. 599, 607; Mialhi *v.* Lassabe, 4 Ala. 712 (payment recovered in bill for conveyance as in Pengall's Case); Keatts *v.* Rector, 1 Ark. 391, 421; Underhill *v.* Allen, 18 Ark. 466; Forrester *v.* Flores, 64 Cal. 24; Salfield *v.* Sutter Co., 94 Cal. 546; Fulton *v.* Jansen, 99 Cal. 587; Eaton *v.* Whitaker, 18 Conn. 222, 229; Tate *v.* Jones, 16 Fla. 605; Price *v.* Price, 17 Fla. 605; Neal *v.* Gregory, 19 Fla. 356 (payment in chattels is not part performance); Black *v.* Black, 15 Ga. 445; Cronk *v.* Trumble, 66 Ill. 428; Temple *v.* Johnson, 71 Ill. 13; Dicken *v.* McKinley, 163 Ill. 318, 323; Johnston *v.* Glancy, 4 Blackf. 94; Cuppy *v.* Hixon, 29 Ind. 522; Mather *v.* Scoles, 35 Ind. 1; Pearson *v.* East, 36 Ind. 27, 30; Carlisle *v.* Brennan, 67 Ind. 12; Suman *v.* Springate, 67 Ind. 115; Felton *v.* Smith, 84 Ind. 485, 491; Green *v.* Groves, 109 Ind. 519; Puterbaugh *v.* Puterbaugh, 131 Ind. 289; Goddard *v.* Donaho, 42 Kan. 754; Guthrie *v.* Anderson, 47 Kan. 383; Green *v.* Jones, 76 Me. 563, 567; Hopkins *v.* Roberts, 54 Md. 312, 316; Washington Co. *v.* Carry, (Md. 1892) 24 Atl. R. 151; Thompson *v.* Gould, 20 Pick. 134; Glass *v.* Hulbert, 102 Mass. 24, 28; Peckham *v.* Balch, 49 Mich. 179; Lanz *v.* McLaughlin, 14 Minn. 72, 76; Townsend *v.* Fenton, 30 Minn. 528; Townsend *v.* Fenton, 32 Minn. 482 (although vendor is insolvent); Slingerland *v.* Slingerland, 39 Minn. 197, 200; Finucane *v.* Kearney, Freem. Ch. (Miss.) 65, 68; Hood *v.* Bowman, Freem. Ch. (Miss.) 290, 294; McGuire *v.* Stevens, 42 Miss. 724; Parke *v.* Leewright, 20 Mo. 85; Ducie *v.* Ford, 8 Mont. 233, 240; Boulder Co. *v.* Farnham, 12 Mont. 1; Poland *v.* O'Connor, 1 Neb. 50; Baker *v.* Wiswell, 17 Neb. 52; Kidder *v.* Barr, 35 N. H. 235; Webster *v.* Blodgett, 59 N. H. 120; Peters *v.* Dickinson, 67 N. H. 389; Brown *v.* Drew, 67 N. H. 569; Cole *v.* Potts, 10 N. J. Eq. 67; Nibert *v.* Baghurst, 47 N. J. Eq. 201; Miller *v.* Ball, 64 N. Y. 286, 292; Winchell *v.* Winchell, 100 N. Y. 159, 163; Cooley *v.* Lobdell, 153 N. Y. 596, 601; Russell *v.* Briggs, 165 N. Y. 500, 505; Sites *v.* Keller, 6 Oh. 489; Pollard *v.* Kinner, 6 Oh. 528; Crabill *v.* March, 38 Oh. St. 331; Shahan *v.* Swan, 40 Oh. St. 25, 40; McKee *v.* Phillips, 9 Watts, 85 (although vendor insolvent); Allen's Est., 1 W. & S. 383, 385; Parker *v.* Wells, 6 Whart. 153, 161; Gangwer *v.* Fry, 17 Pa. 491; Weise's App., 72 Pa. 351, 355 (*dictum contra* in Jones *v.* Peterman, 3 S. & R. 543 overruled); Hatcher *v.* Hatcher, McMull. Eq. 311; Smith *v.* Smith, 1 Rich. Eq. 130, 132, 135; Church *v.* Farrow, 7 Rich. Eq. 378, 385; Mims *v.* Chandler, 21 S. Ca. 480; Humbert *v.* Brisbane, 25 S. Ca. 506; Garner *v.* Stubblefield, 5 Tex. 552; Wood *v.* Jones, 35 Tex. 64; Ward *v.* Stuart, 62 Tex. 333; Bradley *v.* Owsley, 74 Tex. 69, 72; Bradley *v.* Owsley, (Tex. 1892) 19 S. W. R. 340 (although vendor insolvent); Maxfield *v.* West, 6 Utah, 327; Jackson *v.* Cutright, 5 Munf. 308, 318; Brown *v.* Pollard, 89 Va. 696, 701; Gallagher *v.* Gallagher, 31 W. Va. 9, 14; Miller *v.* Lorentz, 39 W. Va. 160; Brandeis *v.* Neustadt, 13 Wis. 142; Horn *v.* Ludington, 32 Wis. 73; Jourdain *v.* Fox, 90 Wis. 99, 101; Harney *v.* Burhans, 91 Wis. 348.

The opposite rule prevails in Delaware, by decision, and in Iowa by statute: Townsend *v.* Houston, 1 Harringt. 532; Houston *v.* Townsend, 1 Del. Ch. 416; Fairbrother *v.* Shaw, 4 Iowa, 570; Franklin *v.* Tuckerman, 68 Iowa, 572; Stem *v.* Nysonger, 69 Iowa, 512; Pressley *v.* Roe, 83 Iowa, 545; Query *v.* Liston, 92 Iowa, 288. — Ed.

to defendant, but defendant had not conveyed the farm to plaintiff according to the parol agreement; and that the defendant had sold the wild land and received some money for it.

The defendant moved for a nonsuit, on the ground that Indebitatus Assumpsit would not lie.

The court overruled the motion and defendant excepted.

SARGENT, J.[1] Defendant claims that here has been a part performance by plaintiff in conveying the wild land to defendant, and that plaintiff has a remedy by bill in equity to enforce a specific performance of the contract, and that having such a remedy he can have no other. But we do not understand such to be the law.

In Allen *v.* Webb,[2] it is held that "where one party to a contract refuses to perform his part of the same, the other party may insist upon the contract being carried out, or he may avail himself of the refusal and rescind the contract." Without considering, therefore, whether the part performance by plaintiff was such as to take the case out of the statute,[3] and enable him to enforce a specific performance on the part of defendant, we think that if such were the admitted fact, the plaintiff might elect his remedy, and either enforce the contract, or rescind it and recover back the value of the land he had conveyed. If the defendant had not sold this land, the count for money had and received could not have been maintained, though the count for land sold would then have been well enough.[4] But the plaintiff may now, by adopting the act of selling on the part of defendant and ratifying the same, recover the money which defendant received for the land under the count for money had and received.

[1] A portion of the opinion is omitted. — ED.

[2] 24 N. H. 278.

[3] In all of the cases cited in the next note it was either decided or assumed that the conveyance by the plaintiff was not such a part performance as to entitle him to exact a conveyance from the defendant. See to the same effect Lowe *v.* Turpie, 147 Ind. 652, 689.

But if the conveyance by A is followed by possession taken by B, the grantee, the latter may be compelled to convey the land which he had agreed orally to transfer in exchange. Caldwell *v.* Carrington, 9 Pet. 86; Bigelow *v.* Armes, 108 U. S. 10; Riggles *v.* Erney, 154 U. S. 244; Roberge *v.* Winne, 144 N. Y. 709. — ED.

[4] Jarboe *v.* Severin, 85 Ind. 496; Worth *v.* Patton, 5 Ind. App. 272; Bassett *v.* Bassett, 55 Me. 127; Basford *v.* Pearson, 9 All. 387; Dix *v.* Marcy, 116 Mass. 416; Root *v.* Burt, 118 Mass. 521, 523; Miller *v.* Roberts, 169 Mass. 134; Peabody *v.* Fellows, 177 Mass. 290; Nugent *v.* Teachout, 67 Mich. 571; Henning *v.* Miller, 83 Hun, 403; Smith *v.* Smith, Winst. Eq. 30 *Accord.*

In Burt *v.* Bowles, 69 Ind. 1, and Dickerson *v.* Mays, 60 Miss. 388, the plaintiff was held entitled to a reconveyance of what he had conveyed.

Recovery of purchase money after conveyance. It being clear from the cases cited in the preceding paragraphs that conveyance by the vendor is not such a part performance as to take the case out of the Statute of Frauds, it follows that the vendor ought not to recover the contract price on the express oral contract. Such is the law in England. Cocking *v.* Ward, 1 C. B. 858; Kelly *v.* Webster, 12 C. B. 283; Green *v.* Saddington, 7 E. & B. 503, 508; Ronanye *v.* Sherrard, Ir. R. 11 C. L. 146. But there are many decisions to the contrary in this country. McCarthy *v.* Pope, 52 Cal. 561; Worden *v.* Sharp, 56 Ill. 105; Chicago Co. *v.* Davis Co., 142 Ill. 171, 183 (*semble*); Huston *v.* Stewart, 64 Ind. 388; Wooley *v.* Sipe, 111 Ind. 238; Wilkinson *v.* Scott, 17 Mass. 249; Nutting *v.* Dickinson, 8 All. 540; Basford *v.* Pearson, 9 All. 387, 390; Wetherbee *v.* Potter, 99 Mass. 354, 362; Root *v.* Burt, 118 Mass. 519, 523; Galley *v.* Galley, 14 Neb. 174; Griffith *v.* Thompson, 50 Neb. 424 (*semble*); Showalter *v.* McDonnell, 83 Tex. 158. See, also, Washington *v.* Soria, 73 Miss. 665. — ED.

T. BUTCHER *v.* STAPELY AND R. BUTCHER.

IN CHANCERY, BEFORE LORD JEFFERIES, C., FEBRUARY 10, 1685.

[1 *Vernon*, 363.]

THE defendant Butcher being seized of the lands in question, which he had mortgaged to one Colstock for 400*l.* agreed with the plaintiff to sell the same to him for 700*l.* A short note was drawn up of the agreement (but not signed by either party). Soon after this agreement the plaintiff puts in his cattle and makes encroachment on the defendant Butcher's other lands; thereupon the defendant to prevent differences desires the plaintiff to repeal the bargain, which he refusing, the defendant told him he should not have the bargain, and advised him not to procure any monies to pay for it, and drove the plaintiff's cattle off the ground, and soon after sold the lands to the defendant Stapely for 740*l.* and the 3d of February, 1682, sealed articles for that purpose, and a bond of 1000*l.* to perform the same. The 26th March, 1683, the plaintiff tendered his purchase-money and writings to seal, which the defendant refused, and the 28th of the same month Stapely paid Butcher 240*l.* and took a conveyance of the estate free from incumbrances, except a mortgage; and in June after paid off the mortgage, and took an assignment of it to a friend of his own.

The bill was to have the bargain and agreement between the plaintiff and defendant Butcher decreed, and charged Stapely with notice of that agreement before his purchase, which Stapely and Butcher denied by answer.

For the defendant Stapely it was insisted that the agreement was not perfect nor binding by the act against frauds and perjuries, it not being signed.

The LORD CHANCELLOR declared, that inasmuch as possession was delivered according to the agreement, he took the bargain to be executed, and that Stapely had notice of it, and that it was a contrivance between the defendants to avoid the bargain; and therefore decreed the defendant Stapely's bargain to be set aside, and that Stapely should execute a conveyance to the plaintiff on payment of 700*l.* and interest, and the defendant Stapely to procure a conveyance from his trustee the assignee of the mortgage.[1]

[1] In most jurisdictions the receipt of possession from one's vendor or lessor or the taking of possession with the acquiescence of the vendor or lessor takes the case out of the Statute of Frauds in favor of the vendee or lessee. Floyd *v.* Buckland, Freem. C. C. 268, pl. 337; Lockey *v* Lockey, Prec. Ch. 518, 519; Lacon *v.* Mertens, 3 Atk. 1, 4; Stewart *v.* Denton, 1 Fonbl. Eq. 187; Boardman *v.* Mostyn, 16 Ves. 467; Gregory *v.* Mighell, 18 Ves. 328; Morphett *v.* Jones, 1 Sw. 172, 181; Neale *v.* Neale, 1 Keen, 672; Dale *v.* Hamilton, 5 Hare, 369, 381; Surcome *v.* Pinniger, 3 D. M. & G. 571; Wilson *v.* West Co., 2 D. J. & S. 475; Pain *v.* Coombs, 1 De G. & J. 34; Miller *v.* Finlay, 5 L. T. Rep. 510; Ramsden *v.* Dyson, L. R. 1 H. L. 129, 170; Coles *v.* Pilkington, 19 Eq. 174; Savage *v.* Carroll, 1 Ba. & Be. 265, 282; Kine *v.* Balfe, 2 Ba. & Be. 343; Clinan *v.* Cooke, 2 Sch. & Lef. 22, 41; Harvey *v.*

EARL OF AYLESFORD'S CASE.

In Chancery, Michaelmas Term, 1714.

[2 *Strange*, 783.]

There was a parol agreement for a lease of twenty-one years, upon which the lessee entered, and enjoyed for six years, and then the Earl brought a bill against him to oblige him to execute a counterpart for the residue of the term. The lessee pleaded the Statute of Frauds and Perjuries, which on argument was overruled, the agreement being in part carried into execution.[1]

Thorpe, 28 Ala. 274 (but now payment also is a statutory requisite. Nelson *v.* Shelby Co., 96 Ala. 575); Keatts *v.* Rector, 1 Ark. 391; Underhill *v.* Allen, 18 Ark. 466; Pindall *v.* Trevor, 30 Ark. 249; Pledger *v.* Garrison, 42 Ark. 246; Hinkle *v.* Hinkle, 55 Ark. 583; Cooper *v.* Newton, 68 Ark. 150, 157; McCarger *v.* Rood, 47 Cal. 138; Forrester *v.* Flores, 64 Cal. 24, 27; Calanchini *v.* Branstetter, 84 Cal. 249; Moulton *v.* Harris, 94 Cal. 420; Von Trotha *v.* Bamberger, 15 Colo. 1 (*semble*); Eaton *v.* Whitaker, 18 Conn. 222; Green *v.* Finick, 35 Conn. 178; Van Epps *v.* Redfield, 69 Conn. 104; Pleasanton *v.* Raughley, 3 Del. Ch. 124; Alderman *v.* Christie, 34 Ga. 152; Tibbs *v.* Barker, 1 Blackf. 58; Johnston *v.* Glancy, 4 Blackf. 94; Mauck *v.* Melton, 64 Ind. 414; Arnold *v.* Stephenson, 79 Ind. 126; Felton *v.* Smith, 84 Ind. 485; Cox *v.* Johnson, 93 Ind. 418; Denlar *v.* Hile, 123 Ind. 68; Puterbaugh *v.* Puterbaugh, 131 Ind. 289; Anderson *v.* Simpson, 21 Iowa, 399; Green *v.* Jones, 76 Me. 563; Drury *v.* Conner, 5 Har. & J. 288; Moale *v.* Buchanan, 11 Gill and J. 314; Morris *v.* Harris, 9 Gill, 19; Weed *v.* Terry, 2 Doug. (Mich.) 344; Bomier *v.* Caldwell, 8 Mich. 463; Kinyon *v.* Young, 44 Mich. 339; Canham *v.* Mooney, 73 Mich. 184; White *v.* Watkins, 23 Mo. 423, 428 (*semble* — abandoned possession insufficient); Charpiot *v.* Sigerson, 25 Mo. 63; Price *v.* Hart, 29 Mo. 171; Adair *v.* Adair, 78 Mo. 630; Emmel *v.* Hayes, 102 Mo. 186 (*semble*); Southmayd *v.* Southmayd, 4 Mont. 100; Haines *v.* Spanogle, 17 Neb. 637; (but see Lipp *v.* Hunt, 25 Neb. 91 — payment also essential); Tilton *v.* Tilton, 9 N. H. 385, 390 (*semble*); Ham *v.* Goodrich, 33 N. H. 32 (*semble*); Brown *v.* Drew, 67 N. H. 569 (*semble*); Green *v.* Richards, 23 N. J. Eq. 32; Wharton *v.* Stoutenburgh, 35 N. J. Eq. 266; Harris *v.* Knickerbacker, 5 Wend. 638; Lowry *v.* Tew, 3 Barb. Ch. 407; Murray *v.* Jayne, 8 Barb. 612; Williams *v.* Pope, Wright (Oh.) 406; Wilbur *v.* Payne, 1 Oh. 251; Armstrong *v.* Kattenhorn, 11 Oh. 265, 272; Kelley *v.* Stanberry, 13 Oh. 408; Pugh *v.* Good, 3 W. & S. 56; Williams *v.* Landman, 8 W. & S. 55; Reed *v.* Reed, 12 Pa. 117; Peckham *v.* Barker, 8 R. I. 17 (*semble*); Smith *v.* Smith, 1 Rich. Eq. 130; Anthony *v.* Leftwich, 3 Rand. 238, 255; Parrill *v.* McKinley, 9 Gratt. 1; Miller *v.* Lorentz, 39 W. Va. 160; Woods *v.* Stevenson, 43 W. Va. 149; Smith *v.* Finch, 8 Wis. 245; Cutler *v.* Babcock, 81 Wis. 195, 202.

Possession followed by Improvements. The doctrine of the principal case was recognized in the following cases in which the buyer or lessee after taking possession laid out money in improvements. Lester *v.* Foxcroft, Colles, P. C 108; Floyd *v.* Buckland, Freem. C. C. 268, pl. 337; Savage *v.* Foster, 9 Mod. 35, 37; Anon., 5 Vin. Ab. 523, pl. 40; Stockley *v.* Stockley, 1 V. & B. 23; Surcome *v.* Pinniger, 3 D. M. & G. 571; Norris *v.* Jackson, 3 Giff. 396; Williams *v.* Williams, 2 Ch. Ap. 294; Reddin *v.* Jarmin, 16 L. T. Rep. 449; Toole *v.* Medlicott, 1 Ba. & Be. 393; Hoffman *v.* Fell, 39 Cal. 109; Day *v.* Cohn, 65 Cal. 508; Hunt *v.* Hayt, 10 Colo. 278; Burns *v.* Fox, 113 Ind. 208; Cutsinger *v.* Ballard, 115 Ind. 93; Fairfield *v.* Barbour, 51 Mich. 57; Putnam *v.* Tinkler, 83 Mich. 628; Hays *v.* Kansas Co., 108 Mo. 544; Johnson *v.* Hurley, 115 Mo. 513; Rosenberger *v.* Jones, 118 Mo. 559, 565; Newton *v.* Swazey, 8 N. H. 9; Burnham *v.* Porter, 24 N. H. 570, 580; Kidder *v.* Barr, 35 N. H. 235; Stillings *v.* Stillings, 67 N. H. 584; Casler *v.* Thompson, 4 N. J. Eq. 59; Bowman *v.* Walford, 80 Va. 213; School District *v.* Macloon, 4 Wis. 79.

Possession and Payment of Purchase Money. The doctrine of the principal case was recognized in the following cases also, in which the vendee or lessee paid the purchase money besides taking possession. Thompson *v.* Scott, 1 McC. Ch. 32; Roberts *v.* Smith, 21 S. Ca. 454; Swearman *v.* Edmunds, 28 S. Ca. 58 (see Watts *v.* Witt, 39 S. Ca. 356 — is payment essential?); Neel *v.* Neel, 80 Va. 584; Blanchard *v.* McDougall, 6 Wis. 167; Cameron *v.* Austin, 65 Wis. 152; Frede *v.* Pflugradt, 85 Wis. 119. — Ed.

[1] Entry into possession with the consent of vendor or lessor is such part performance as

UNGLEY *v.* UNGLEY.

Chancery Division, June 19, 1877.

[*Law Reports*, 5 *Chancery Division*, 887.]

Jessel, M. R.[1] This is an appeal from a decision of Vice-Chancellor Malins, and two questions arise on the appeal, one of law and one of fact.

First, as to the question of law. A man, in consideration of the marriage of his daughter, promises his intended son-in-law that he will give his daughter a particular house on her marriage as a wedding present. This promise he makes orally without writing; and immediately after the marriage he puts his daughter and son-in-law in possession, and they remain in possession till the death of their father. The father dies intestate, and it is now objected by his administrator that by reason of the Statute of Frauds all that goes for nothing, and that they must give up the house. I am of opinion that that is not the law. The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the Statute of Frauds being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the court to admit evidence of the terms of the contract in order that justice may be done between the parties. In the present case it is quite clear that the defendants were put into possession of the house in pursuance of some contract, and the only other question is one of fact, namely, what were the terms of the contract.

On the particular question in the present case, having read the evidence which was given before the Vice-Chancellor, my opinion is that it has been proved that there was a promise — not a mere expectation, but an actual promise — to give the house.

With regard to the question of the £110 which was due to the building society on the property, it is clear that if you once prove that a man has made an agreement to sell a house, it must be taken that he means to sell it free from incumbrances, without his saying so. So, if a man agrees to settle a house in consideration of marriage, he must be taken to mean free from incumbrances. And I can see no difference in this respect between a freehold and a leasehold house.

to take the case out of the Statute in favor of the vendor or lessor. Pyke *v.* Williams, 2 Vern. 455; Bowers *v.* Caton, 4 Ves. 91; Howard *v.* Patent Co. 38 Ch. D. 156; Kine *v.* Balfe, 2 Ba. & Be. 343; Andrews *v.* Babcock, 63 Conn. 109; Wimberly *v.* Bryan, 55 Ga. 198; Felton *v.* Smith, 84 Ind. 485; Owings *v.* Baldwin, 8 Gill, 337, 356 (*semble*); Bechtel *v.* Cone, 52 Md. 698; Tatum *v.* Brooker, 51 Mo. 148; Reynolds *v.* Reynolds, 45 Mo. App. 622; Brewer *v.* Wilson, 17 N. J. Eq. 180 (*semble*); Reed *v.* Reed, 12 Pa. 117, 127 (*semble*); Steenrod *v.* R. R. Co., 27 W. Va. 1; Seaman *v.* Ascherman, 51 Wis. 678; Cutler *v.* Babcock, 81 Wis. 195, 204. — Ed.

But see, *contra*, Luckett *v.* Williamson, 37 Mo. 388.

[1] Only the judgment of th court upon the question of law is given. — Ed.

I am, therefore, of opinion that the respondents are entitled to have an assignment of this house free from incumbrance, and that the £110 must be paid out of the intestate's estate.[1]

COLE *v.* WHITE.

In Chancery, before Lord Camden, C., 1767.

[1 *Brown, Chancery Cases,* 409 (*cited*).]

There was an agreement for a lease for four years, and the bill charged that possession was given; defendant pleaded the statute, and by his answer denied that possession was delivered in part performance, and swore that the plaintiff obtained it wrongfully. The plea was allowed,[2] and Lord Camden said that the giving instructions for a lease could not make part of the case as a part performance.[2]

SMITH *v.* TURNER.

In Chancery, before Sir J. Jekyll, M. R., Michaelmas Term, 1720.

[*Precedents in Chancery,* 561 (*cited*).]

A lessee by parol agreed to take a lease for a term of years certain, and continued in possession on the credit thereof; yet there being no writing to make out this agreement, it is directly within the statute.[3]

[1] Surcome *v.* Pinniger, 3 D. M. & G. 571; Sharman *v.* Sharman, 67 L. T. Rep. 834; Dugan *v.* Gittings, 3 Gill, 140, 157; Welch *v.* Whelpley, 62 Mich. 15; Henry *v.* Henry, 27 Oh. St. 121 *Accord.* — Ed.

[2] Purcell *v.* Miner, 4 Wall, 513; Wright *v.* Raftree, 181 Ill. 464; Moore *v.* Higbee, 45 Ind. 487; Neal *v.* Neal, 69 Ind. 419; Waymire *v.* Waymire, 141 Ind. 164; Carrolls *v.* Cox, 15 Iowa, 455; Bean *v.* Valle, 2 Mo. 126, 135; Park *v.* Leewright, 20 Mo. 88; Boulder Co. *v.* Farnham, 12 Mont. 1; Poland *v.* O'Connor, 1 Neb. 50; Camden Co. *v.* Stewart, 18 N. J. Eq. 489; Nibert *v.* Baghurst, 47 N. J. Eq. 201; Jervis *v.* Smith, Hoff. Ch. 470; German *v.* Machin, 6 Paige, 288 (no part performance by possession on oral agreement for sale of reversion after life estate); Lord *v.* Underdunck, 1 Sandf. Ch. 46; Cooley *v.* Lobdell, 153 N. Y. 596; Givens *v.* Calder, 2 Dess. 171; Thompson *v.* Scott, 1 McC. Ch. 39 *Accord.* — Ed.

[3] It is generally agreed that mere continuance in possession is not such part performance of an oral agreement as to take it out of the Statute of Frauds. Morphett *v.* Jones, 1 Sw. 172, 181; Brennan *v.* Boulton, 2 Dr. & W. 349; Harman *v.* Harman, 70 Fed. R. 894, 935; Danforth *v.* Laney, 28 Ala. 274; Andrews *v.* Babcock, 63 Conn. 109, 121; Wood *v.* Thornly, 58 Ill. 464; Koch *v.* Nat. Ass'n, 137 Ill. 497; Johnston *v.* Glancy, 4 Blackf. 94; Carlisle *v.* Brennan, 67 Ind. 12; Rucker *v.* Steelman, 73 Ind. 396; Railsback *v.* Walke, 81 Ind. 409; Green *v.* Groves, 109 Ind. 519; Mahana *v.* Blunt, 20 Iowa, 142; Wilmer *v.* Farris, 40 Iowa, 309, Recknagle *v.* Schmaltz, 72 Iowa, 63; Rosenthal *v.* Freiburger, 26 Md. 75; Price *v.* Hart, 29 Mo. 171, 173; Emmel *v.* Hayes, 102 Mo. 186 (overruling Simmons *v.* Headlee, 94 Mo. 482, and Emmel *v.* Headlee, (Mo. 1888) 7 S. W. R. 22); Taylor *v.* Von Schraeder, 107

FRAME *v.* DAWSON.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., NOVEMBER 19, 1807.

[14 *Vesey*, 386.]

THE bill stated that the plaintiff, possessed of a house for a term of thirty-one years from Christmas, 1800, at the yearly rent of 35*l.*, with the usual covenant, among others, for repairing and keeping in repair, &c., having, in 1803, employed a builder to repair the house, the party wall was discovered to be in a very ruinous state. The plaintiff upon that discovery applied to the defendant, to whom, as purchaser of the premises, he had attorned; requesting that the defendant would either contribute to the repairs or make some abatement in the rent. The defendant refused to do either; but promised in consideration of the plaintiff's repairing the party wall to grant him a farther term of ten years. Upon the faith of that promise the plaintiff proceeded, and laid out 460*l.*, being obliged to rebuild a great part of the wall. The bill therefore prayed, that the defendant may be decreed specifically to perform his agreement to grant an extension of the lease for ten years.

The defendant by his answer admitted that, upon the plaintiff's request that he would contribute something to the expense of rebuilding or repairing the party wall, the defendant said that, if the plaintiff should be obliged to pull down the wall and rebuild it, he might be induced to grant a farther term of ten years; but denied that he made any absolute promise or agreement; and insisted upon the Statute of Frauds.

Parol evidence was produced on both sides, proving the respective allegations in the bill and answer.

Mr. *Fonblanque*, for the plaintiff, relied upon the part performance; as taking the case out of the Statute of Frauds.

Sir *Samuel Romilly*, Mr. *Thompson*, and Mr. *Rainsford*, for the defendant, observed upon the extent, to which the doctrine of part performance had gone; and insisted that the act must be unequivocal: Wills *v.* Stradling; that the act upon which the plaintiff relied was equivocal; and could not be evidence of any agreement; as the party wall must have been rebuilt under the Act of Parliament if there had been no agreement; and this case therefore is a striking instance of the wisdom of the statute.

The MASTER OF THE ROLLS. It is admitted, that supposing an agreement ever so clearly proved, yet, as a parol agreement, the plain-

Mo. 206, 228; Peters *v.* Dickinson, 67 N. H. 389; Armstrong *v.* Katterhorn, 11 Oh. 265; Crawford *v.* Wick, 18 Oh. St. 190; R. R. Co. *v.* West, 57 Oh. St. 161, 168; Jones *v.* Peterman, 3 S. & R. 543; Ackerman *v.* Fish, 57 Pa 596; Poag *v.* Sandifer, 5 Rich. Eq. 170; Anthony *v.* Leffwich, 3 Rand 238 *Accord.* — ED.

tiff is not entitled to have it executed. It is necessary therefore to show a part performance; that is, an act, unequivocally referring to, and resulting from, the agreement; and such, that the party would suffer an injury, amounting to fraud, by the refusal to execute that agreement. But that is not the nature of the act in this case. First, it is equivocal. Secondly, it is such as easily admits of compensation, without executing the agreement. This is not an unequivocal act; for it would have taken place equally, if there had been no agreement. The principle of the cases is, that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted, to show what the agreement is. But this act would not infer the existence of any agreement; as it must have been done by the party either at his own or the landlord's expense. Then, is there such an injury as cannot easily be repaired in any other way than by executing the agreement? No; for the money, which he has expended, he may recover from the landlord; if it was by the landlord that the expense was to be borne. The circumstance, that the party may be obliged to resort to an action to get back his money, is no reason for taking the case out of the statute.

Lord Redesdale, in a case before him, states his opinion[1] that payment of money is not a part performance: yet there the act can hardly be said to be equivocal in its nature; as the payment of a price presupposes a sale: but the money may be repaid; and the parties are restored to their former situation. This case is stronger; for the expenditure does not imply a precedent agreement.

Suppose my tenant should set up an agreement for a purchase; and get a witness to swear to it; and then offer, as evidence of part performance, his possession and cultivation of the land: could that be deemed an act of part performance, which would have existed precisely in the same shape, whether there was any agreement for a purchase or not?

The bill was dismissed.

JOHN BURNS *v.* LYMAN W. DAGGETT.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH 31, 1886.

[141 *Massachusetts Reports*, 368.]

W. ALLEN, J.[2] There is no sufficient memorandum in writing, as required by the Statute of Frauds,[3] and the only question is, whether there has been such part performance of the oral contract by the plaintiff as to entitle him to a decree against the defendant for specific performance.

[1] Clinan *v.* Cooke, 1 Sch. & LeF. 40.
[2] Only the opinion of the court is given. — ED.
[3] Pub. Sts. c. 78, § 1, cl. 4.

The only part performance relied upon is the occupation of the premises, and the making of repairs and improvements upon them. These do not of themselves constitute such part performance as to do away with the statute. To have that effect, the occupation of the premises and the expenditures upon them must have been induced by the contract, and in reliance upon its performance, and such that adequate compensation could not be made for them by the defendant except by the conveyance of the premises, so that it would be fraudulent in him to withhold a conveyance, and he would be estopped from setting up the Statute of Frauds against the plaintiff's demand for a deed. Glass *v.* Hulbert,[1] Potter *v.* Jacobs.[2]

The agreement was for the conveyance of two acres of land and a house for $700, $10 to be paid each month and annual interest on the balance till all should be paid; and the plaintiff was to make necessary repairs on the house and pay the taxes. The agreement was made in 1871, and the plaintiff then went into possession, and continued the occupation, without interruption, until 1881, and in that time spent about $100 in repairs on the house, and set out a few fruit trees and vines, and cleared off bushes, and improved a small piece of land at slight expense. The master found that a reasonable rent for the premises was $7 a month. Up to April 16, 1881, both parties appear to have been acting under the oral contract, although there seems to have been some misunderstanding as to its terms. The plaintiff had paid to the defendant, besides the taxes and the $100 for repairs on the house, about $550 on the contract debt, $400 of which was for interest and the rest on the principal of $700, and had had the use of the premises, worth, at $7 a month, over $850. Under these circumstances the defendant went upon the premises in April, 1881, with a surveyor, for the purpose of surveying the land included in the contract, and a disagreement arose between the parties as to the lines of the land agreed upon. The plaintiff then told the defendant that he would have nothing more to do with the place, and all he wanted was that the defendant should pay him what he owed him; and the defendant told him he would do so whenever the plaintiff would leave the house. The plaintiff made no further payment, and there was no further communication between the parties, the plaintiff continuing to occupy the premises until December, 1881, when the defendant entered upon the premises and constructed a road through them. The plaintiff then objected to the making of the road, and demanded a deed, but made no tender of payment. After the survey was completed, in April, 1881, the plaintiff expressed himself, but not to the defendant, as satisfied with the lines run, and afterwards built a fence, at a cost of $25. In November, 1882, the defendant tendered to the plaintiff the amount he had paid on the contract, above the interest, and requested him to quit the premises.

These facts do not show such a part performance of the contract by the plaintiff as to entitle him to a decree for specific performance. It

[1] 102 Mass. 24. [2] 111 Mass. 32.

is enough to refer to the cases of Glass *v.* Hulbert, and Potter *v.* Jacobs, *ubi supra*. The principles upon which the acts of a party give him an equitable right to enforce a contract which the statute says shall not be enforced by action, are fully considered in the former case,[1] and practically applied in the latter. In the latter case it appeared that the plaintiffs were induced by the defendant to do acts, in reliance upon the performance of the contract, for which there could be no adequate compensation if the contract should not be performed; and the court held that "there was possession taken, accompanied by part payment and such change of position that the purchasers cannot now be restored to their rights if the contract be abandoned. The refusal to complete it is in the nature of a fraud, and the defendant is estopped to set up the Statute of Frauds in defence."

The facts in the case at bar afford no such conclusion. After the plaintiff had enjoyed the use of the premises for nearly ten years, and had made no improvements of any amount, and expended but $100 for necessary repairs, and had paid but a small portion of the consideration, and in all less than the value of the use and occupation, so far from having done acts for which he could have no redress if the contract were abandoned, it may have been for his advantage that the parties should not be held to the contract. If he could receive back the portion of the principal of the purchase money which he had paid, and be relieved from further payments, he would have received, in the value of the use of the premises, more than double the whole amount he had expended. Whether the conversation of April 16, 1881, was in itself a rescission of the contract is immaterial; in connection with the circumstances, it is conclusive that the plaintiff had not then done

1 "That the purchaser has been let into possession, in pursuance of a parol agreement, has been very generally recognized as sufficient to take it out of the statute. The reasoning by which this result was reached is far from satisfactory; and even where the rule prevails, there are frequent intimations that it is regarded as trenching too closely upon the spirit as well as the letter of the statute. If it were now open to settle the rule anew, we cannot doubt that it would be limited to possession accompanied with or followed by such change of position of the purchaser as would subject him to loss for which he could not otherwise have adequate compensation or other redress; and that mere change of possession would not be held to take a case out of the statute. However it may be elsewhere, we are disposed to hold the rule to be so in Massachusetts. . . .

"Mere possession of land does not expose the party to loss or danger of loss without redress at law. The parol agreement of sale and purchase, with permission to enter, though not to be enforced as a valid contract of sale, will constitute such a license as will protect the party from liability for acts done before the license is revoked, and for all acts necessary to enable him to remove himself and his property from the premises after such revocation. If possession be taken without such permission, express or implied, it is no foundation for relief in equity, according to any of the authorities. The argument, for the admission of parol evidence to prove an agreement within the Statute of Frauds in order to enforce it in equity, drawn from the admissibility of such evidence to maintain a defence, either at law or in equity, seems to be based upon a misconception of the purport and force of the statute, which reaches no farther than to deny the right of action to enforce such agreements.

"In this Commonwealth, the possession of land by a purchaser is not even notice to a third party of an unrecorded deed. The whole spirit of our laws in respect to real estate is against the policy of enabling parties to acquire or confer title, either legal or equitable, by mere parol and delivery of possession." Per WELLS, J., in Glass *v.* Hulbert, 102 Mass. 32-34. — ED.

acts under the contract for which he could have redress only by carrying out the contract, and the defendant's acquiescence in which would make the defence that the contract was not in writing fraudulent. After that, the plaintiff continued to occupy the premises for a year and a half, but made no payment, or offer of payment, of the consideration, but expended $25 for fencing. When the defendant, eight months after the conversation of April 16, having heard nothing from the plaintiff, entered upon the premises, it is not at all clear that the act was contrary to an existing verbal contract; but, if it were, it was not such a fraudulent or wrongful violation of it that he would be estopped to set up its invalidity. The subsequent occupation of the premises by the plaintiff for a year, without tendering any part of the consideration, or making any expenditure upon the place, though accompanied with demands for a deed, does not present the conduct of the defendant in a fraudulent aspect, and the tender by him of all that the plaintiff claimed to be due on the rescission of the contract shows that no wrong incapable of compensation was done to the plaintiff.

The facts found by the master, if they do not show that the use and occupation of the premises were full compensation and indemnity to the plaintiff for all that he did upon them, certainly fail to show any equity in him, in consequence of part performance of the verbal contract, sufficient to override and set aside the Statute of Frauds.

Bill dismissed.[1]

[1] Jacobs *v.* Peterborough Co., 8 Cush. 223, 224; Potter *v.* Jacobs, 111 Mass. 32; Barnes *v.* Boston Co., 130 Mass. 388, 391; Graves *v.* Goldthwait, 153 Mass. 268, 269; Low *v.* Low, 173 Mass. 580 *Accord.*

The Massachusetts rule seems to prevail in the FEDERAL COURTS, and is clearly the law in TEXAS. Purcell *v.* Miner, 4 Wall. 513. (But see Townsend *v.* Vanderwerker, 160 U. S. 171, 183); Dugan *v.* Colville, 8 Tex. 126; Robinson *v.* Davenport, 40 Tex. 333; Ann Berta Lodge *v.* Leverton, 42 Tex. 18; Bradley *v.* Owsley, 74 Tex. 69; Bradley *v.* Owsley, (Texas, 1892) 19 S. W. R. 340; Morris *v.* Gaines, 82 Tex. 255; Weatherford Co. *v.* Wood, 88 Tex. 191, 194.

In PENNSYLVANIA, also, the courts have, in several cases, stated the doctrine of part performance in terms closely resembling the rule in Massachusetts: "The evidence must establish the fact that possession was taken in pursuance of the contract, and at or immediately after the time it was made, the fact that the possession was notorious, and the fact that it has been exclusively continuous and maintained. And it must show performance or part performance by the vendee which could not be compensated in damages, and such as would make rescission inequitable and unjust." Per Woodward, J., in Hart *v.* Carroll, 85 Pa. 508, 510. This statement has been cited in numerous later decisions in Pennsylvania. It seems, however, that in Pennsylvania either possession coupled with payment of the purchase money or possession followed by improvements of the property purchased is such part performance of an oral contract as to take it out of the statute. Billington *v.* Welsh, 5 Binn. 129; Bassler *v.* Niesly, 2 S. & R. 352; Gilday *v.* Watson, 2 S. & R. 407; Galbreath *v.* Galbreath, 5 Watts, 146; Rhodes *v.* Frick, 6 Watts, 315; Johnston *v.* Johnston, 6 Watts, 370; Dougan *v.* Blocker, 24 Pa. 28; McGibbens *v.* Burmeister, 53 Pa. 332; Jamison *v.* Dimock, 95 Pa. 52; Miller *v.* Zufall, 113 Pa. 317; Reno *v.* Moss, 120 Pa. 496; Anderson *v.* Brinser, 129 Pa. 373; Schuey *v.* Shaeffer, 130 Pa. 16; McKnight *v.* Bell, 135 Pa. 358; Graft *v.* Loucks, 138 Pa. 453; Sample *v.* Horlacher, 177 Pa. 247; Derr *v.* Ackerman, 182 Pa. 591. But in some Pennsylvania cases the general rule, that possession by the buyer with the consent of the seller will justify the enforcement of the oral contract, was adopted. See *supra*, 279, 280, n. 1.

In NEW YORK and VERMONT, also, it would seem that possession must be supplemented either by payment of the whole or a part of the purchase money, or by improvements, in order to take the case out of the statute. Miller *v.* Ball, 64 N. Y. 287; Winchell *v.* Winchell,

SAMUEL ALBEA *v.* WILLIAM GRIFFIN AND OTHERS.

SUPREME COURT, NORTH CAROLINA, JUNE TERM, 1838.

[2 *Devereux & Battle, Equity*, 9.]

THIS was a bill for the specific execution of a contract for the sale of a tract of land containing fifty acres. The defence was the act of 1819 avoiding parol contracts for the sale of land and slaves.

Upon the hearing the case was, that the ancestor of the defendants contracted to convey the land to the plaintiff for fifty dollars, to be taken up in goods at the store of the plaintiff — that the goods were in part delivered — that the land was surveyed, and the plaintiff put in possession of it by the vendor — that he, the plaintiff, built a house upon it, and that the vendor gave him the assistance in raising it, which is usual between neighbors in the country. The vendor died without having executed a deed for the land, and it descended to the defendants.

GASTON, J., after stating the facts as above, proceeded: It is objected on the part of the defendants that by our act of 1819 all parol contracts to convey land are void, and that no part performance can, in this state, take a parol contract out of the operation of that statute. We admit this objection to be well founded, and we hold as a consequence from it that the contract being void, not only its specific performance cannot be enforced, but that no action will lie in law or equity for damages because of non-performance. But we are nevertheless of opinion that the plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity. The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and by the act of God, or by the caprice of the defendants, this expectation has been

100 N. Y. 159; McFadden *v.* Allen, 134 N. Y. 489; Dunckel *v.* Dunckel, 141 N. Y. 427; Pawling *v.* Pawling, 86 Hun, 503, affirmed 150 N. Y. 574; Wendell *v.* Stone, 39 Hun, 382; Cooper *v.* Monroe, 77 Hun, 1; Gibbs *v.* Horton Co., 61 N. Y. Ap. Div. 621. (But see New York cases cited *supra*, pp. 279, 280, n. 1, and Williston *v.* Williston, 41 Barb. 635.)

Sutton *v.* Sutton, 13 Vt. 71; Pike *v.* Morey, 32 Vt. 37; Stark *v.* Wilder, 36 Vt. 752; Griffith *v.* Abbott, 56 Vt. 356; Holmes *v.* Caden, 57 Vt. 111.

In ALABAMA, ILLINOIS, and probably in NEBRASKA and OREGON, possession must be supplemented by payment. Nelson *v.* Shelby Co., 96 Ala. 515 (statutory).

Thornton *v.* Henry, 3 Ill. 218; Lane *v.* Sharpe, 4 Ill. 566; Fitzsimmons *v.* Allen, 39 Ill. 440; Holmes *v.* Holmes, 44 Ill. 168; Temple *v.* Johnson, 71 Ill. 13, 16; Ferbrache *v.* Ferbrache, 110 Ill. 210; Gorham *v.* Dodge, 122 Ill. 528; Wright *v.* Raftree, 181 Ill. 464, 473–474. (This doctrine was recognized in the following cases in which possession, payment, and improvements excluded the operation of the statute: Shirley *v.* Spencer, 9 Ill. 583; Ramsey *v.* Lister, 25 Ill. 114; Stevens *v.* Wheeler, 25 Ill. 300; Blunt *v.* Thompson, 27 Ill. 93; Mason *v.* Barr, 33 Ill. 194; Keys *v.* Test, 33 Ill. 316; Fleming *v.* Carter, 70 Ill. 286; Laird *v.* Allen, 82 Ill. 43; Langston *v.* Bates, 84 Ill. 524; McNamara *v.* Garrity, 106 Ill. 384; Graham *v.* Dodge, 122 Ill. 528.)

Lipp *v.* Hunt, 25 Neb. 91 (but see Haines *v.* Spanogle, 17 Neb. 637).

Wallace *v.* Scoggins, 17 Oreg. 476. — ED.

frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired to his injury. Baker and Wife *v.* Carson.[1] If they repudiate the contract, which they have a right to do, they must not take the improved property from the plaintiff without compensation for the additional value which these improvements have conferred upon the property.

The court therefore directs that it be referred to the clerk of this court, to inquire and report what is the additional value conferred on the land in question by the improvements of the plaintiff, and that he state an account between the parties, charging the plaintiff with a fair rent since the death of Andrew Griffin, and crediting him with what has been advanced towards payment for said land, and with the amount of the additional value so conferred upon it.

PER CURIAM. *Decree accordingly.*[2]

J. MUNDY *v.* H. JOLLIFFE AND ANOTHER.

IN CHANCERY, BEFORE LORD COTTENHAM, C., NOVEMBER 5, 1839.

[5 *Mylne & Craig*, 167.]

THIS was a bill filed by a tenant [from year to year] against his landlord, for the specific performance of a parol agreement to grant a lease, [for fourteen years] on the ground of part performance of the agreement on the part of the tenant.

[1] 1 Dev. & Bat. 381.

[2] "By the English courts of equity, and by those of this country, the statute requiring all contracts for the sale of lands, or any interest therein, to be in writing, and signed by the party to be charged therewith, is held to be one for the suppression of frauds and perjuries. The former courts have put such a construction upon this statute as, in their judgment, best carries out the intention of the legislature. Thus they have decided that a substantial part performance of a parol contract will take a case out of the statute, as where the purchaser has been put into possession of the bargained premises; upon the ground that it would be a fraud in the party refusing to execute it under such circumstances. Our courts have refused to follow the example of the English courts in this particular. The first case under our statute was that of Ellis *v.* Ellis, 1 Dev. Eq. 180, where it was decided that our statute ought to receive the same construction with the English statute. This case was, however, reviewed very soon thereafter, and the decree reversed. 1 Dev. Eq. 341. The doctrine upon this point has ever since been considered as settled, in this State: that where to a bill for the specific performance of a parol contract, the defendant denies the contract as alleged, and relies on the statute, *no parol* evidence can be received even upon the ground of part performance." Per Nash, C. J., in Barnes *v.* Teague, 1 Jones, Eq. 277, 279.

See, to the same effect, Ellis *v.* Ellis, 1 Dev. Eq. 341, 398 (reversing s. c. 1 Dev. Eq. 180); Dunn *v.* Moore, 3 Ired. Eq. 364; Alien *v.* Chambers, 4 Ired. Eq. 125, 130; Plummer *v.* Owen, Busb. Eq. 254; Barnes *v.* Teague, 1 Jones, Eq. 277; Barnes *v.* Brown, 71 N. Ca. 507 (see also White *v.* Holly, 91 N. Ca. 67).

In KENTUCKY, MISSISSIPPI, and TENNESSEE, also, the doctrine of part performance is repudiated. Grant *v.* Craigmills, 2 Bibb, 203; Hawkins *v.* King, 2 A. K. Marsh. 108, 109; Worley *v.* Tuggle, 4 Bush, 168, 190; Holtzclaw *v.* Blackerby, 9 Bush, 40; Usher *v.* Flood, 83 Ky. 552; Dean *v.* Cassiday, 88 Ky. 572; Bullitt *v.* Eastern Co., 99 Ky. 324; Beaman *v.* Buck, 17 Miss. 207; Box *v.* Stamford, 21 Miss. 673; Catlett *v.* Bacon, 33 Miss. 269; Hairston *v.* Jandon, 42 Miss. 380; McGuire *v.* Stevens, 42 Miss. 724; Niles *v.* Davis, 60 Miss. 750, 752; Washington *v.* Soria, 73 Miss. 665; Patton *v.* McClure, Mart. & Y. 333; Ridley *v.* McNairy, 2 Humph. 174. — ED.

As tenant from year to year the plaintiff was not bound to repair the buildings or to drain the land.[1]

The Lord Chancellor. The bill seeks a specific performance of a verbal contract for a lease, founded upon part performance. The contract, as stated in the bill, is for a lease for fourteen years, from the 29th of September, 1825, determinable by either party at the end of the first seven years, upon six months' notice. The rent 120*l*. The lessee well and effectually to drain the lands, and to lay down a piece of arable into pasture, and to put and keep the buildings in good and substantial repair, the landlord finding timber for the tenant.

The tenant's bill has been dismissed, with costs, by the Vice-Chancellor,[2] upon the ground that there was not evidence of a concluded agreement; and, at the bar, it has been contended that the evidence does not prove the agreement as stated in the bill. This is the only question to be inquired into; because, if an agreement be proved, there is no doubt of the part performance. The drainage and the repairs are distinctly proved, and the defendant, who did not attempt to disprove the fact, has wholly failed in proving the case set up in his answer, of such works having been done at his expense.

In the view I take of the case, it is not necessary to advert further to the answer and to the defence there set up. Courts of equity exercise their jurisdiction, in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect, if it can, what the terms of it really were. It is not necessary, in this case, to adopt any such course of proceeding; for I think an agreement for a lease sufficiently proved, and that acts of part performance are proved, so as to take the case out of the Statute of Frauds; and I think the defences set up have wholly failed.

It follows that the decree of the Vice-Chancellor must be reversed, and that there must be a decree for a specific performance of the agreement as stated in the bill, and a reference to settle the lease, if the parties differ about it; and the defendant must pay the costs of the suit.[3]

[1] Only a portion of the judgment of the court is given. — Ed.

[2] 9 Sim. 413.

[3] Sutherland *v.* Briggs, 1 Hare, 26; Williams *v.* Evans, 19 Eq. 547; Tate *v.* Jones, 16 Fla. 216; Morrison *v.* Herrick, 130 Ill. 631 (explaining Wood *v.* Thornly, 58 Ill. 464); Pearson *v.* East, 36 Ind. 27 (two of four judges dissenting); Padfield *v.* Padfield, 92 Ill. 198; and Pickerell *v.* Moore, 97 Ill. 220; Pfiffner *v.* Stillwater Co., 23 Minn. 343; Emmel *v.* Hayes, 102 Mo. 186, 198) (*semble*); Rhea *v.* Jordan, 28 Gratt. 678; Vickers *v.* Sisson, 10 W. Va. 12; Campbell *v.* Fetterman, 20 W. Va. 398; Fisher *v.* Moolick, 13 Wis. 321 *Accord.* — Ed.

WILLS *v.* STRADLING.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, C., MAY 24, 1797.

[3 *Vesey, Jr.*, 378.]

THE bill stated the following case: —

The plaintiff was lessee of a farm for seven years at the rent of 34*l.* a year under the defendant, the widow of the lessor, under whose will she is entitled to the premises during her widowhood. The lease being to expire in 1794, the plaintiff in June, 1793, being desirous of making some improvements upon the premises, which would be attended with a very considerable expense, applied for a new lease for the term of 14 years. The defendant agreed to grant a lease for the said term, if she should so long live and continue a widow, at the rent of 36*l.* a year; and immediately or very shortly after the agreement the plaintiff upon the faith of the agreement and in confidence, that he should enjoy for the 14 years under the agreement, began to make improvements, and hath laid out a great deal of money upon the premises. The plaintiff continued in possession after the expiration of the former lease, and paid the increased rent, for which the defendant gave him receipts.

The bill prayed a specific performance of the agreement.

The defendant pleaded the Statute of Frauds, with an averment that there was no agreement in writing.[1]

LORD CHANCELLOR. In Whaley *v.* Bagenal,[2] there were a vast many circumstances of conduct and behavior upon the supposition of an agreement; but none that amounted to part performance. One strong circumstance was, the vendor setting up that purchase, which he afterwards denied, as a defence against an *Elegit*.

Though in general I feel a very strong inclination to support the Statute of Frauds and to give the party the benefit of it by way of plea, I think I must in this case call upon the defendant to make an answer to one part of the bill. Three grounds are stated: possession by the plaintiff, which he refers to the agreement; payment of an increased rent, which he also refers to the agreement; and the circumstance stated of considerable sums of money having been laid upon the improvement of the farm. As to the first ground, the possession in the case of a tenant, who of course continues in possession unless he has notice to quit, the mere fact of his continuance in possession (which is all the plea can admit, for *quo animo* he continued in possession is not a subject of admission) would not weigh. The delivery of possession by a person having possession to the person claiming under the agreement is a strong and marked circumstance; but the mere holding over by the tenant, which he will do of course, if he has no notice to quit, would not of itself take the case out of the statute

[1] The arguments of counsel are omitted. — ED.

[2] 6 Bro. P. C. 45.

or even call for an answer. As to the money laid out, I feel the distinction pressed by the Solicitor-General very strongly; that if it was part of the contract that money shall be laid out, and it is one of the considerations for granting the lease (the laying out which must be then with the privity of the landlord) it is very strong to take it out of the statute. But the circumstance, which I think distinguishes this case, is the payment of the additional rent.[1] Payment of additional rent *per se* is an equivocal circumstance, it is true. It may be, that he shall hold over from year to year, the lease being expired. There may be other inducements. But how stands the averment upon this plea? It is, that the landlord accepted the additional rent upon the foot of the agreement. Then the acceptance upon the ground of the agreement, which is the averment upon this plea, is not equivocal at all. It is incumbent upon the defendant to say whether it was merely accepted upon a holding from year to year, or any other ground. How would it stand at law? Suppose this averment was proved by parol evidence: it would be a good lease for three years, and would defend the tenant against an ejectment brought within the three first years. Charlewood *v.* The Duke of Bedford,[2] which finally turned upon the want of authority in the steward, is an authority, upon which under the circumstances alleged in this bill the benefit of the plea ought to be saved to the hearing. Let the plea stand for an answer, with liberty to except.

As to the danger mentioned by the Solicitor-General, and which I a little anticipated, if the defendant admits the agreement, as stated in the bill, there can be no danger; if he does not admit the agreement, as stated, it will come to a very material question, whether I should permit that agreement to be sustained by any parol evidence.

[1] The payment of an increased rent was held to take the case out of the statute in the following cases: Nunn *v.* Fabian, L. Ch. Ap. 35 (but see Humphreys *v.* Green, 10 Q. B. Div. 148); Williams *v.* Evans, 19 Eq. 547, 554; Desart *v.* Goddard, Wallis, 347; Archbold *v.* Howth, Ir. R. 1 C. L. 608, 621; Clark *v.* Reilly, Ir. R. 2. C. L. 422 (*semble*); Howe *v.* Hall, Ir. R. 4 Eq. 242 (*semble*); Conner *v.* Fitzgerald, L. R. 11 Ir. 106; Spear *v.* Orendorf, 26 Md. 37 *Accord*. Compare Wilde *v.* Fox, 1 Rand. 165.

Similarly, the payment of the purchase money by one who was tenant in possession at the time of the oral agreement takes it out of the statute. Pawling *v.* Pawling, 86 Hun. 502, affirmed 150 N. Y. 574.

In Hodson *v.* Henland, 1896, 2 Ch. 428, the execution of a lease was decreed in favor of one, who, in anticipation of an expected oral agreement for a lease, entered into possession, with the consent of the future lessor, one day before the terms of the oral agreement were definitely settled. The lessee paid rent also, but the court attached no importance to this fact. — Ed.

[2] 1 Atk. 497.

LAMAS *v.* BAYLY.

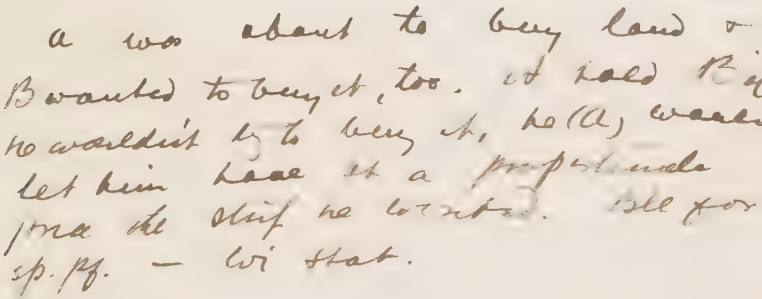
IN CHANCERY, BEFORE LORD HARCOURT, C., NOVEMBER 6, 1708.

[2 *Vernon*, 627.]

PLAINTIFF being about to purchase from the co-heirs of Mr. Guifford an old house and toft of ground in Hoxton, adjoining to his own house, designing thereby principally to secure his lights, and to add a small part of it to his own house; and the defendant being also in treaty to purchase. The plaintiff and defendant met together; and it was proposed and agreed unto, that the plaintiff Lamas should desist, and permit the defendant to purchase; and thereupon the defendant should permit the plaintiff to have at a proportionable price the slip of ground he desired for a convenience to his house, and to prevent the stopping up of his lights. The plaintiff desisted accordingly, and the defendant purchased; but afterwards refused to perform the agreement.

The plaintiff brought his bill, and obtained a decree at the Rolls; it being insisted, that although it was an agreement parol; yet it was in part executed by the plaintiff's desisting from prosecuting his purchase, who otherwise might have purchased for himself; or at least have enhanced the price, the defendant was to pay, so that the defendant had a benefit by it; and besides it was a fraud, and like the case where a man agreed to purchase as agent for another; and would afterwards retain the purchase to himself.

But upon an appeal to the Lord Chancellor, the decree was reversed, as being a parol agreement, within the provision of the statute against frauds.



CLERK *v.* WRIGHT.

IN CHANCERY, BEFORE LORD HARDWICKE, C., FEBRUARY 8, 1737.

[1 *Atkyns*, 12.]

THE plaintiff had agreed for the purchase of an estate of the defendant, but the agreement was not reduced into writing; however, in confidence of the agreement, plaintiff had given orders for conveyances to be drawn and engrossed, and went several times to view the estate; some time after the defendant sent a letter to the plaintiff, informing him, that at the time he contracted for the sale of the estate, the value of the timber was not known to him, and that the plaintiff should not have the estate unless he would give him a larger price.

The bill was brought to carry the agreement into execution, to which the statute of frauds afterwards was pleaded.

Lord Chancellor allowed the plea, and observed the letter could not be sufficient evidence of the agreement, the terms of the agreement not being therein mentioned. As to the objection that this agreement was in part performed, he allowed, that when a man takes possession in pursuance of an agreement, or does any act of the like nature, the court will decree an execution of it, but the circumstances only of giving directions for conveyances and going to take a view of the estate he thought not sufficient.[1]

1 Bawdes *v.* Amhurst, Prec. Ch. 402; Pembroke *v.* Thorpe, 3 Sw. 437 n. (admeasurement of the estate); Hawkins *v.* Holmes, 1 P. Wms. 770 (registration of deed by seller); Whaley *v.* Bagnel, 1 Bro. P. C. (Toml. Eq.) 345 (delivery of rent-roll to buyer and sending tenants to treat with him for renewal of leases); Whitchurch *v.* Bevis, 2 Bro. C. C. 559, 566; Redding *v.* Wilkes, 3 Bro. C. C. 400 (giving a deed to solicitor with instructions); Cooke *v.* Tombs, 2 Aust. 420 (giving instructions to solicitor); Phillips *v.* Edwards, 33 Beav. 440 (preparation of deed); Nibert *v.* Baghurst, 47 N. J. Eq. 201, 205 *Accord.* — ED.

E. MADDISON, Appellant, *v.* J. ALDERSON, Respondent.

House of Lords, June 4, 1883.

[*Law Reports*, 8 *Appeal Cases*, 467.]

Appeal from an order of the Court of Appeal (Bramwell, Baggallay and Brett, L. JJ.), reversing a decision of Stephen, J.[1]

Earl of Selborne, L. C.[2] My Lords, the appellant in this case lived for many years, as housekeeper, in the service of Thomas Alderson, who died on the 16th of December, 1877. She originally entered his service in 1845, and having become his housekeeper some years before 1860, continued to serve him in that capacity down to the time of his death. He was, when he died, the owner in fee simple of a freehold estate at Moulton, in Yorkshire, called the Manor House Farm, in extent about ninety-two acres, and in value about £137 per annum, which had been devised to him by the will of an uncle, who died in 1863. It is certain that he intended to leave the appellant (subject to a small annuity) a life interest in this estate, for he had a will prepared for that purpose in 1872, which he signed in 1874, and which only failed for want of due attestation.

The question which (at the instance of the appellant's counsel, and without objection from the respondent) was left by Mr. Justice Stephen to the jury, was "whether the defendant was induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a promise, made by him to her, to make a will, leaving her a life estate in Moulton Manor Farm, if and when it became his property." That question the jury answered in the affirmative.

Mr. Justice Stephen and the Court of Appeal arrived at the conclusion that a contract was proved in this case (notwithstanding the character of the evidence and the form of the verdict), on which, but for the Statute of Frauds, the appellant might have been entitled to relief; but they differed on the question of part performance, Mr. Justice Stephen thinking that there was part performance sufficient to take the case out of the Statute of Frauds, the Court of Appeal thinking otherwise. This makes it necessary for your Lordships now to examine the doctrine of equity as to part performance of parol contracts.

The cases upon this subject (which are very numerous) have all, or nearly all, arisen under those words of the 4th section of the Statute of Frauds, which provide that "no action shall be brought to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or

[1] 7 Q. B. D. 174.

[2] The arguments of counsel, the judgments of Lord O'Hagan and Lord Fitzgerald, and portions of the judgments of Lord Selborne and Lord Blackburn are omitted. — Ed.

note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." It has been recently decided by the Court of Appeal in Britain *v.* Rossiter [1] that the equity of part performance does not extend, and ought not to be extended, to contracts concerning any other subject-matter than land; an opinion which seems to differ from that of Lord Cottenham (see Hammersley *v.* De Biel,[2] and Lassence *v.* Tierney).[3] That equity has been stated by high authority to rest upon the principle of fraud. "Courts of Equity will not permit the statute to be made an instrument of fraud." By this it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it; and I agree with an observation made by Lord Justice Cotton in Britain *v.* Rossiter,[4] that this summary way of stating the principle (however true it may be when properly understood) is not an adequate explanation either of the precise grounds, or of the established limits, of the equitable doctrine of part performance.

It has been determined at law (and in this respect there can be no difference between law and equity) that the fourth section of the Statute of Frauds does not avoid parol contracts, but only bars the legal remedies by which they might otherwise have been enforced: Crosby *v.* Wadsworth;[5] Leroux *v.* Brown;[6] Britain *v.* Rossiter.[7]

From the law thus stated the equitable consequences of the part performance of a parol contract concerning land seem to me naturally to result. [In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself.] If such equities were executed, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between

[1] 11 Q. B. D. 123.
[2] 12 Cl. & F. 64 n.
[3] 1 Mac. & G. 572.
[4] 11 Q. B. D. 130.
[5] 6 East, 602, 611.
[6] 12 C. B. 824.
[7] 11 Q. B. D. 123.

undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only and not that in which there are equities resulting from *res gestæ* subsequent to and arising out of the contract. So long as the connection of those *res gestæ* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestæ* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement.

This must, I think, have been the principle on which the House of Lords proceeded in 1701, when it reversed the decree of Lord Somers, in Lester *v.* Foxcroft.[1] Lord Redesdale in Clinan *v.* Cooke,[2] and Bond *v.* Hopkins,[3] referred to that case as if it had been the earliest decision on the subject. But there were, in fact, two prior cases before Lord Guilford, — Hollis *v.* Edwards and Butcher *v.* Stapely decided in 1683 and 1685, within the first ten years after the enactment of the Statute of Frauds, in the earlier of which the Lord Keeper had refused, and in the latter had granted, relief. Butcher *v.* Stapely was a strong case upon its circumstances; for the relief was there granted to a purchaser in possession of land under an unsigned agreement, against a subsequent purchaser (with notice) of the same land from the vendor, the defendant having paid his purchase money under a signed agreement and having obtained a conveyance of the legal estate. Lord Guilford "declared that inasmuch as possession was delivered according to the agreement *he took the bargain to be executed.*"

Among later cases I may refer to Pengall *v.* Ross, decided by Lord Cowper in 1709; Lockey *v.* Lockey,[4] by Lord Macclesfield in 1719; and Potter *v.* Potter,[5] by Strange, Master of the Rolls, in 1750. "There must be something," said Lord Cowper,[6] "more than a bare payment of money on the one part to induce the court to decree a specific performance on the other part, either by putting it out of the party's power to undo the thing, or where it would be a prejudice to the party, performing his part, as beginning to build, or letting the other into possession, etc. — in such case, where the agreement hath proceeded so far on one part, the statute never intended to restrain this court from decreeing a performance of the other." Lord Macclesfield said[7] that an unwritten agreement, "if executed on one part, had been always looked upon so far conclusive as to induce the court to decree an execution on the other part, *not to destroy or avoid the*

[1] Colles Par. Cas. 108.
[2] 1 Sch. & Lef. 22.
[3] 1 Sch. & Lef. 433.
[4] Prec. Ch. 519.
[5] 1 Ves. Sen. 441.
[6] 2 Eq. C. Ab. 46.
[7] Prec. Ch. 519.

agreement so far as it was already carried into execution." Sir John Strange [1] said, "If confessed or in part carried into execution, it will be binding on the parties, and carried into further execution as such, in equity."

The doctrine, however, so established has been confined by judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress. The present case, resting entirely upon the parol evidence of one of the parties to the transaction, after the death of the other, forcibly illustrates the wisdom of the rule, which requires some *evidentia rei* to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which may not be solved without recourse to equity. It is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract.

Lord Hardwicke in Gunter *v.* Halsey [2] said: "As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement" ("the terms of which," he added, "must be certainly proved"). He thought it indeed consistent with that rule to treat the payment of purchase money, in whole or in part, as a sufficient part performance: Lacon *v.* Mertens,[3] Owen *v.* Davies, 1747.[4] This Lord Cowper in Pengall *v.* Ross, and Lord Macclesfield in Seagood *v.* Meale [5] had refused to do. On that point later authorities have overruled Lord Hardwicke's opinion; and it may be taken as now settled that part payment of purchase money is not enough; and judges of high authority have said the same even of payment in full: Clinan *v.* Cooke,[6] Hughes *v.* Morris,[7] Britain *v.* Rossiter.[8] Some of the reasons which have been given for that conclusion are not satisfactory; the best explanation of it seems to be, that the payment of money is an equivocal act, not (in itself), until the connection is established by parol testimony, indicative of a contract concerning land. I am not aware of any case in which the whole purchase money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged. Cooth *v.* Jackson,[9] Frame *v.* Dawson, Morphett *v.* Jones.[10] "The acknowledged possession" (said Sir T. Plumer in Morphett *v.* Jones [10]) "of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorize an inquiry into the terms, the

[1] 1 Ves. Sen. 441.
[2] Amb. 586.
[3] 3 Atk. 1.
[4] 1 Ves. Sen. 83.
[5] Prec. Ch. 561, A. D. 1721.
[6] 1 Sch. & Lef. 40
[7] 2 D. M. & G. 356.
[8] 11 Q. B. D. 123.
[9] 6 Ves. 38.
[10] 1 Sw. 181.

court regarding what has been done as a consequence of contract or tenure."

"It is in general," said Sir James Wigram (Dale *v.* Hamilton [1]), "of the essence of such an act that the courts shall by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. . . . But an act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as for example, the payment of a sum of money alleged to be purchase money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the court does not in general give relief" (see also Britain *v.* Rossiter,[2] per Lord Justice Cotton). The acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land. The law of equitable mortgage by deposit of title deeds depends upon the same principles.

Examples of circumstances which have been held insufficient for this purpose are found in (1) Clerk *v.* Wright, and Whaley *v.* Bagenal,[3] where acts preparatory to the completion of a contract were held not to be part performance; (2) Wills *v.* Stradling, where the mere holding over by a tenant (unless qualified by the payment of a different rent) was held not to be enough "even to call for an answer;" (3) Lamas *v.* Bayley, where the plaintiff, being engaged in a treaty for the purchase of land, desisted, in order that the defendant might buy it, on an agreement that he should have part of it when so bought at a proportionate price; but his "desisting from the prosecution of his purchase" was held to be no part performance; and (4) O'Reilly *v.* Thompson,[4] where the agreement alleged was that upon the plaintiff obtaining from a third party a release of a right to a lease claimed by him, the defendant would grant to the plaintiff a lease of the same premises on certain terms. The plaintiff did obtain a release from the party in question of the right claimed by him for valuable consideration; but, nevertheless, a plea of the Statute of Frauds was allowed, Chief Baron Eyre saying, "These circumstances are not a sufficient part performance, but they are a condition annexed, and necessary to be fulfilled by the plaintiff to entitle him to call for an execution of the contract;" meaning, as I presume, that they were a condition precedent to the contract, as distinguished from acts done after a concluded contract, and in part performance of it.

The law deducible from these authorities is, in my opinion, fatal to the appellant's case. Her mere continuance in Thomas Alderson's service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a con-

[1] 5 Hare, 381. [2] 11 Q. B. D. at p. 130. [3] 1 Bro. P. C. 345. [4] 2 Cox, 271.

tract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease. The relinquishment of any chance which she might have had of marriage was of no greater force than the relinquishment of the treaty for purchase in Lamas *v.* Bayley. The alleged acts of part performance preceded, and therefore could not be evidence of, any contract on her part; their performance was (as in O'Reilly *v.* Thompson[1]) a condition precedent, without the fulfilment of which the promise which the jury found to have been made by Thomas Alderson could not on his part become a binding contract.

Two cases, on which I think it well to add some remarks, were cited by the learned counsel for the appellant, as favorable to their argument, Walker *v.* Walker,[2] and Parker *v.* Smith.[3]

In Walker *v.* Walker[2] Lord Hardwicke did not execute any parol contract on the ground of part performance, or otherwise; all that he did was, to relieve the defendant from a liability which the plaintiff's conduct had made it inequitable to enforce. There had been a parol agreement between A. and B., that A. would surrender a copyhold belonging to him to C., charged with annuities in favor of B., if B. would surrender another copyhold of his own to C. A. surrendered his copyhold accordingly, charged with the annuities, and died; B. did not surrender; but he sought nevertheless by his bill to enforce payment of the annuities against C. Lord Hardwicke dismissed the bill, saying, that "*he was not clear*" that the agreement might not have been established by cross bill, upon the principle of part performance. To such a *dictum*, not even the authority of so great a judge can give much weight. It does not appear how, if there had been a binding agreement, C., who was no party to it, could have claimed specific performance. The true equity was that which was actually administered, viz., to relieve A.'s copyhold, in the hands of C., from the charge which B. unconscientiously sought to enforce.

Of the other case (Parker *v.* Smith,[4] before Vice-Chancellor Knight Bruce), I think it enough to say, that it was dealt with in an extraordinary manner, and is difficult to reconcile with Cooth *v.* Jackson.[5] The acts to which the court gave the effect of part performance were done before any definite terms of agreement had been, even by parol, concluded between the parties. It might well have been held, that there was an agreement duly signed according to the Statute of Frauds on the 30th of November, 1842; but the supposed acts of part performance were done before that time; and, until then, everything, as to the terms of the intended new lease, remained unsettled. I cannot, therefore, regard Parker *v.* Smith[6] as a satisfactory authority.

I am sorry for the appellant's disappointment, through the ignorance of her late master as to the attestation requisite for a valid testamentary act. But the law cannot be strained for the purpose of

[1] 2 Cox, 271. [2] 2 Atk. 98. [3] 1 Coll. 608.
[4] Id. [5] 6 Ves. 38. [6] 1 Coll. 608.

relieving her from the consequences of that misfortune. It would, in my opinion, be much strained, and the equitable doctrine of part performance of parol contracts would be extended far beyond those salutary limits within which it has hitherto been confined, if your Lordships were to reverse the order of the Court of Appeal. I should have been glad if that court had dealt differently with the costs; as she has lost, not only the estate intended for her, but also her wages; but costs were within their discretion, and their decree cannot be altered in that respect, being otherwise correct. This House has also to exercise a discretion as to the costs of this appeal; and I humbly venture to recommend to your Lordships that it should be dismissed without costs.

Lord Blackburn. My Lords, I have come to the conclusion that this is not a case in which part performance gives an equitable right to have the contract (assuming that there was one) specifically performed, though I speak with diffidence, as I have not been able to discover to my satisfaction what is the principle which is involved in the numerous cases in equity on the subject.

I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract. At first this was not universally accepted as the true construction. It was thought by many very high authorities that the statute did not apply when, from the nature of the proof, there could be no risk of perjury. Sales by auction and sales negotiated through brokers were by some thought, for this reason, not to be within the statute. Lord Mansfield intimates such an opinion in Simon *v.* Motivos.[1] I do not think it can be said to have been finally settled that such sales were within the statute, till Schofield *v.* Kenworthy,[2] as late as 1824. And there are indications that great equity judges on a similar principle thought that whenever acts had been done which were such as to be consistent only with the existence of a contract, the case was taken out of the mischief of the statute and the only question was the sufficiency of the proof of what the contract was. I so understand some of Lord Hardwicke's remarks in Gunter *v.* Halsey[3] and Lacon *v.* Mertins.[4] This principle would apply whether the unequivocal act was a giving possession of the land or paying the price in whole or in part.

As soon as it was established that the construction of the statute was not what had been supposed, and that a contract within the 4th section was not enforceable unless signed by or on behalf of the party to be charged, even though signed by the one party and accepted and kept by the other who was sought to be charged or otherwise unexceptionably proved, I think this class of cases ought to have been considered overruled; but though I speak with diffidence as to the effect of decisions in equity, it seems to me that to some extent, at

[1] 1 W. Bl. 599. [2] 2 B. & C. 945. [3] Amb. 586. [4] 3 Atk. 1.

least, they were not. Those which tended to show that payment in whole or in part would take the case out of the statute are overruled by the authorities cited by the Lord Chancellor, but there are cases that for the purpose of enforcing a specific performance of a contract for the purchase of an interest in land, a delivery of possession of the land will take the case out of the statute. This is, I think, in effect to construe the 4th section of the Statute of Frauds as if it contained these words, "or unless possession of the land shall be given and accepted." Notwithstanding the very high authority of those who have decided those cases, I should not hesitate if it was *res integra* in refusing to interpolate such words, or put such a construction on the statute. But it is not *res integra*, and I think that the cases are so numerous that this anomaly, if, as I think, it is an anomaly, must be taken as to some extent at least established. If it was originally an error it is now, I think, *communis* error, and so makes the law.

There are many rules laid down as to what should guide a judge, determining for himself what the facts are, in thinking the proof of a contract sufficient. I see great difficulty, now that equity is to be administered by a court which has the facts found by a jury, in applying these to a trial by jury, but that is a question not raised now. But I do not think this anomaly should be extended; and it is not a little remarkable that there is no case, at least none was cited, and I have found none, in which there has not been a change in the possession of the land, or, in the case where the purchaser was a tenant already in possession, a change in the nature of his tenure, which, rightly or wrongly, was held equivalent to a change in the possession.

The conduct of the parties may be such as to make it inequitable to refuse to complete a contract partly performed. Wherever that is the case, I agree that the contract may be enforced on the ground of an equity arising from the conduct of the party. The moral justice of the case was completely with the appellant in Lester *v.* Foxcroft,[1] and as that case was decided more than 180 years ago by this House it is too late now to inquire whether the decision there overruled was not more consistent with technical equity. If there was proof of the allegation that the heir-at-law kept back the deeds from the dying man when he wished to execute them, it would seem that the reversal was quite right. Lord Redesdale doubts whether the cases founded on it have been as well considered.[2]

But the cases where this is given as the ground of decision are all cases in which there has been a change of possession, and I do not think that, as far as they are anomalous, they should be extended to a case where there has not been such a change. I do not doubt that, without any such change, actual fraud might give a ground for equitable relief. But Alderson, whether he only held out hopes that he would make a will in the defendant's favor, or actually contracted so to make his will, did mean to make it. There can be no fraud on his part, therefore, unless it is said that in equity it amounts to fraud

[1] Colles, Par. C. 108.

[2] Bond *v.* Hopkins, 1 Sch. & Lef. 433, 4.

not to complete a contract when the consideration is one that cannot be restored or compensated for. But this would go a great deal too far. Where a parol promise is in consideration of marriage, and the marriage actually takes place, the consideration can neither be restored nor compensated for; when a parol promise is to answer for the default of another and credit is given on the faith of such a parol guarantee to one who makes default, the consideration cannot be restored, and cannot be compensated for except by fulfilling the contract of guarantee. In those cases such a principle would render the statute a nullity, and it has been decided in Britain *v.* Rossiter,[1] that this principle does not apply to contracts not to be performed within a year. And it would, I think, be a strange construction to apply this principle to one of the four cases in the same section of the statute where it cannot be applied to the three others. It has never been done, and it is impossible not to see that if there is any case in which the policy of the Statute of Frauds clearly applies, it is such a case as this, where the promise set up is one not to come into force till after the death of the person who is alleged to have made it.

I have therefore come to the conclusion that the judgment below should be affirmed.[2]

Order appealed from affirmed; and appeal dismissed.

[1] 11 Q. B. D. 123.

[2] The doctrine of the principal case, that services rendered in pursuance of an oral promise to convey an interest in land by way of compensation do not take the case out of the statute, is followed generally. O'Reilly *v.* Thompson, 2 Cox, 271 (procuring a release from a stranger); Edwards *v.* Estell, 48 Cal. 194 (services as surveyor); Grant *v.* Grant, 63 Conn. 530 (companionship as a virtually adopted child); Mills *v.* Joiner, 20 Fla. 479 (household services of a daughter); Gorham *v.* Dodge, 122 Ill. 528 (care of mother); Cloud *v.* Greasley, 125 Ill. 313 (work, labor, and materials); Johns *v.* Johns, 67 Ind. 440 (care and support of a father); Wallace *v.* Long, 105 Ind. 522 (*semble* — household services); Austin *v.* Davis, 125 Ind. 472, 475 (*semble* — household services); Baldwin *v.* Squier, 31 Kan. 283 (household services); Renz *v.* Drury, 57 Kan. 84 (household services); Ham *v.* Goodrich, 33 N. H. 32 (household services); Peters *v.* Dickinson, 67 N. H. 389 (work and labor); Devinney *v.* Corey, 23 N. Y. St. Rep. 308 (affirmed 127 N. Y. 655 — care of parents); Russell *v.* Briggs, 165 N. Y. 500 (services as real estate broker — 3 judges dissenting); Howard *v.* Brower, 37 Oh. St. 402 (business services); Crabill *v.* Marsh, 38 Oh. St. 331 (care of father-in-law); Peifer *v.* Landis, 1 Watts, 392 (household services); Frye *v.* Shepler, 7 Barr, 91 (care of relative); Moyer's App., 105 Pa. 432 (*semble* — care of grandfather); Ward *v.* Stuart, 62 Tex. 333 (work and labor); Wright *v.* Puckett, 22 Gratt. 370; Horn *v.* Ludington, 32 Wis. 73 (legal services); Clark *v.* Davidson, 53 Wis. 317 (work and labor); Ellis *v.* Cary, 74 Wis. 176 (care of stepfather); Koch *v.* Williams, 82 Wis. 186 (architect's services); Kessler's Est., 87 Wis. 660 (care of uncle).

But see *contra*, Chastain *v.* Smith, 30 Ga. 96 (*semble* — legal services for client who became insolvent); Warren *v.* Warren, 105 Ill. 568 (care of father for 40 years); Twiss *v.* George, 33 Mich. 253 (care of stepfather); Kinyon *v.* Young, 44 Mich. 339 (work and labor); Taft *v* Taft, 73 Mich. 502 (work and labor); Lloyd *v.* Hollenback, 98 Mich. 203 (care of father); Gupton *v.* Gupton, 47 Mo. 37 (care of relative); Hiatt *v.* Williams, 72 Mo. 214; Carney *v.* Carney, 95 Mo. 353; Teats *v.* Flanders, 118 Mo. 660, 669 (*semble* — care of relative); Hall *v.* Harris, 145 Mo. 614 (care of relative); Fuchs *v.* Fuchs, 48 Mo. Ap. 18 (care of relative); Davison *v.* Davison, 13 N. J. Eq. 246 (care of relative); Schutt *v.* Missionary Society, 41 N. J. Eq. 115; Pflugar *v.* Plutz, 43 N. J. Eq. 440 (household services); Vreeland *v.* Vreeland, 53 N. J. Eq. 387 (care of relative); Rhodes *v.* Rhodes, 3 Sandf. Ch. 279 (care of brother — a repulsive invalid); Brinton *v.* Van Cott, 8 Utah, 480 (care of old woman by young girl).

See also Hinkle *v.* Hinkle, 55 Ark. 583.

An oral promise to convey or devise the whole or a part of a homestead farm in consid-

MALINS *v.* BROWN.

Court of Appeals, New York, December, 1850.

[4 *New York Reports*, 403.]

The bill in this cause was filed by John Malins against Brown and others, executors of Nathan Munroe, deceased, for the purpose of enforcing an agreement alleged to have been made by the decedent, to discharge certain lands from the lien of a mortgage held by him.

Malins, in 1836, negotiated with one Heman Ward for the purchase of forty acres of land situated in Brutus, Cayuga County, for which he was to pay $1500. Munroe, the defendant's testator, at that time held a mortgage on the same lands and on other lands for about $2200, which had been given by Ward in 1833. Malins declined to complete the purchase unless the forty acres which he proposed to buy should be released from the mortgage; and it was thereupon verbally agreed between Malins, Ward, and Munroe, that $700 of the purchase money should be paid to Munroe to apply on his mortgage, and that he should thereupon release the forty acres from the lien of the mortgage. The purchase was thereupon consummated and the consideration paid down, of which $700 was paid on the mortgage. The deed given by Ward to Malins contained the usual covenant of warranty. Munroe alleged some excuse for not executing the release at the same time, and promised to execute it at any time when called upon. He was called upon during his life, but did not give the release. After his death the defendants, his executors, were also called upon for the same purpose, but they declined, alleging that they knew nothing of the pretended agreement. In the year 1837 the plaintiff sold the premises in question to one Drake, and gave a deed therefor containing a covenant of warranty.

The Vice-Chancellor of the Seventh Circuit, before whom the cause was originally heard on pleadings and proofs, sustained the bill, and

eration of the promisee's services in caring for the promisor and carrying on or assisting in the management of the farm, is not taken out of the statute by the circumstance that the promisee occupies the farm. For if he can be said to have possession at all, he has not the exclusive possession. Cronk *v.* Trumble, 66 Ill. 428; Johns *v.* Johns, 67 Ind. 440; Ham *v.* Goodrich, 33 N. H. 32; Wible *v.* Wible, 1 Grant (Pa.), 406; Gallagher *v.* Gallagher, 31 W. Va. 9; Wright *v.* Puckett, 22 Gratt. 370. See also Cuppy *v.* Hixon, 29 Ind. 522 (wife buys homestead of husband and lives with him as before. No part performance, her possession not being exclusive).

If, however, such a promisee lays out money in improvements, he may enforce the oral promise. Twiss *v.* George, 33 Mich. 253; Kinyon *v.* Young, 44 Mich. 339; Lamb *v.* Hinman, 46 Mich 112; Lloyd *v.* Hollenback, 98 Mich. 203.

An oral promise to convey or devise land to a child in consideration of the consent of the parent or guardian of the child to the virtual adoption of the child by the promisor is not enforceable, even though the child, in pursuance of the promise, has become a permanent member of the promisor's family. Wallace *v.* Rappeleye, 103 Ill. 229; Pond *v.* Sheehan, 132 Ill. 312; Dicken *v.* McKinley, 163 Ill. 318; Shahan *v.* Swan, 48 Oh. St. 25.

But see *contra*, Sharkey *v.* McDermott, 91 Mo. 647 (*semble*); Nowack *v* Berger, 133 Mo. 24; Van Duyne *v.* Vreeland, 12 N. J. Eq. 142 — Ed.

decreed that the executors execute a release of the mortgage as to the forty acres of land in question. The Supreme Court in the seventh district affirmed the decree, and the executors of Munroe appealed to this court.

GARDINER, J.[1] The defendants insist upon the Statute of Frauds. To permit them to avoid the agreement upon this ground would be to make the statute an instrument of fraud instead of a shield against it. The money was paid by Malins and accepted by Munroe, as a complete performance of the agreement upon the part of the former. It was paid, relying upon the release of Munroe, which was *then* to be executed, and not upon his contract, that it should be given at a future period.

It is said that the payment of money will not take the contract out of the statute. This may be considered as an unsettled question, where the contract is for the sale of lands. It has been decided both ways in England.[2] Clinan *v.* Cooke.[3] In Wetmore *v.* White [4] it was assumed that payment of the consideration entitled the party to a specific performance. The reason assigned by those who deny that payment of the consideration is, in equity, a part performance, is that the money may be recovered back, and the party reinstated in his former condition. This reason, which has been deemed unsatisfactory, has no application to this case. The *whole* purchase money was paid, and the sale consummated, upon the assurance that the release would be given. The recovery of the $700 and interest would not indemnify the vendee. He has been drawn into a purchase, which he would not have made, independent of the agreement of Munroe. That will always be considered a part performance, "which puts a party in a situation which is a fraud upon him, unless the agreement is executed." [5] Such was the condition of the vendee in this case, and he is entitled to relief notwithstanding the statute.

Decree affirmed.[6]

1 The arguments of counsel, the concurring opinion of Taylor, J., and a portion of the opinion of Gardiner, J., are omitted. — ED.

2 13 Ves. 461, n. 1, Sumn. ed.; 3 Atk. 1.

3 1 Sch. & Lef. 40.

4 2 Cai. Cas. in Err. 109.

5 2 Story's Eq. § 761.

6 Gross *v.* Milligan, 176 Mass. 566 *Accord.*

Miscellaneous Acts amounting to Part Performance. — Martin *v.* Martin, 170 Ill. 639 (two co-owners join in a lease in pursuance of oral agreement not to make partition); Farwell *v.* Johnston, 34 Mich. 342 (husband and wife join in conveyance of their homestead); Brown *v.* Hoag, 35 Minn. 373 (conveyance of land to a third person); Slingerland *v.* Slingerland, 39 Minn. 197 (dismissal of pending actions ready for trial); Hancock *v.* Malloy, 187 Pa. 371 (abandonment of claims); Daniels *v.* Lewis, 16 Wis. 140 (forbearance to sue until claim was barred by the statute of limitations).

Acts not amounting to Part Performance. — Ducie *v.* Ford, 138 U. S. 587 (abandonment of claim and surrender of contested possession); Gould *v.* Mansfield, 103 Mass. 408 (making of will by one of the parties to an agreement to make wills in favor of each other); Hale *v.* Hale, 90 Va. 728 (same as preceding case). — ED.

S. FREEMAN, Appellant, *v.* J. A. FREEMAN, Respondent.

Court of Appeals, New York, October 25, 1870.

[43 *New York Reports*, 34.]

Appeal from an order of the General Term of the Supreme Court in the sixth judicial district, reversing a judgment for the plaintiff entered upon the report of a referee, and ordering a new trial.

The action was ejectment, and the answer set up a claim for specific performance of a contract to give the premises in controversy.

Grover, J.[1] The referee finds that when the plaintiff purchased the lands in controversy, being about forty acres of land, wild, with the exception of about six acres which had been wholly or partially cleared, he gave it to the defendants. That is, that he promised to give it to them for their lives and the life of the survivor, in case they would move to and reside thereon, and that in pursuance of such promise, the defendants moved to the premises and occupied the same from February, 1860, to the time of the trial of the action. That the defendants cleared twelve or fifteen acres of the land and fenced the same, and built an addition to the house upon the premises, being somewhat assisted therein by the plaintiff. That the defendants have paid a portion of the taxes assessed upon the land. I have assumed that the referee by the words "gave the land to the defendants" meant to be understood, that he promised to give it to them. That such was his meaning appears from the evidence, as there was no evidence of any attempt at the former, while the proof of the latter was ample. The question then is, whether a parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promisor, made comparatively large expenditures in permanent improvements upon the land. It is, and must be conceded, that if the promise by parol was to sell the land for a valuable consideration to be paid therefor by the promisee, such promise under this precise state of facts would be enforced. The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practised upon the parol purchaser by the seller, by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure, and secure it to the seller by permitting the latter to avoid the performance of his contract. In the case supposed, there has been no part performance of the contract, strictly speaking, except the taking possession, no part of the purchase money having been paid; and yet the cases are numerous where performance of such contract has been decreed in equity, where possession has been taken under the contract

[1] Only a portion of the opinion of the court is given. — Ed.

and large expenditures upon permanent improvements made. In the present case, possession has been taken under the promise and the expenditures upon improvements made, yet it is insisted that equity will not enforce the promise for the reason that it was to give, instead of having been to sell the land for a valuable consideration. Permitting the promisor to avoid performance operates as a fraud as much in the latter as in the former case, so far as expenditures upon improvements are concerned. The counsel for the appellant insists that there has been no part performance of the contract to give the land. The answer to this is, that possession has been taken, and valuable improvements made upon the faith of the promise. These acts constitute part performance by the respondents. It is true that the plaintiff has done nothing by way of performance on his part. It is not necessary that he should. Part performance by the party seeking to enforce the contract is sufficient. It is further insisted, that an executory promise, not founded upon any valuable consideration, is a mere nude pact, furnishing no grounds for an action at law, and that performance of such a promise will not be enforced in equity. This is true so long as the promise has no consideration. Anything that may be detrimental to the promisee or beneficial to the promisor in legal estimation will constitute a good consideration for a promise. Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise, made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise. Lobdell *v.* Lobdell,[1] Crosbie *v.* McDaul,[2] Shephard *v.* Bivin.[3] The Statute of Frauds has no bearing upon the case. If the promise reduced to writing could, under the circumstances, be enforced in equity, it may be, although by parol. (2 Statutes at Large, 139, § 10.) The order granting a new trial must be affirmed, and judgment final upon the stipulation rendered against the plaintiff.

All concurring. Order of General Term affirmed and judgment for defendant ordered.[4]

[1] 33 How. 347; id. 1, 32.

[2] 13 Vesey, 147.

[3] 9 Gill, 32; Parsons on Contract, 3 vol. p. 359.

[4] King *v.* Thompson, 9 Pet. 204 (*semble*); Neale *v.* Neale, 9 Wall. 1, Riggles *v.* Erney, 154 U. S. 244, 253 (*semble*); Burlingame *v.* Rowland, 77 Cal. 315; Mims *v.* Lockett, 33 Ga. 9; Poullain *v.* Poulain, 76 Ga. 420; Bright *v.* Bright, 41 Ill. 97 (*semble* — no relief, because no improvements); Kurtz *v.* Hibner, 55 Ill. 514; Worth *v.* Worth, 84 Ill. 442 (*semble*); Langston *v.* Bates, 84 Ill. 524; Bohanan *v.* Bohanan, 96 Ill. 591; Smith *v.* Yocum, 110 Ill. 142; Fouts *v.* Roof, 171 Ill. 568; Geer *v.* Goudy, 174 Ill. 514 (*semble*); Dunn *v.* Berkshire, 175 Ill. 243; Gaines *v.* Kendall, 176 Ill. 228; Clancy *v.* Flusky, 187 Ill. 605; Haddon *v.* Haddon, 42 Ind. 378; Lee *v.* Carter, 52 Ind. 342; McFerran *v.* McFerran, 69 Ind. 29; Swales *v.* Jackson, 126 Ind. 282; Allbright *v.* Hannah, 103 Iowa, 98; Bigelow *v.* Bigelow (Maine, 1901) 49 Atl. R. 49; Welch *v.* Whelpley, 62 Mich. 15; Russell *v.* Russell, 94 Mich. 122; Anderson *v.* Shockley, 82 Mo. 250; Ford *v.* Steele, 31 Neb. 521; Wylie *v.* Charlton, 43 Neb. 840; Brown *v.* Prescott, 63 N. H. 61; Stillings *v.* Stillings, 67 N. H. 584; France *v.* France, 8 N. J. Eq. 650; Eyre *v.* Eyre, 19 N. J. Eq. 102; Lobdell *v.* Lobdell, 36 N. Y. 327; Young *v.* Overbaugh, 145 N. Y. 158; Knapp *v.* Hungerford, 7 Hun, 588; Dana *v.* Wright, 23 Hun, 29; Martin *v.* McCord, 5 Watts, 493; Beaver *v.* Filson, 8 Barr, 327; Sower *v.* Weaver, 84 Pa. 262, 78 Pa. 443; Wootters *v.* Hale, 83 Tex. 563; Burkholder *v.* Ludlam, 30 Gratt. 255; Fishburne *v.* Ferguson, 85 Va. 321; Lorentz *v.* Lorentz, 14 W. Va. 761 *Accord.* — Ed.

SEAVEY *v.* DRAKE AND ANOTHER, EXECUTORS.

SUPREME COURT, NEW HAMPSHIRE, DECEMBER, 1882.

[62 *New Hampshire Reports*, 393.]

BILL in equity for specific performance of a parol agreement of land. At the hearing the plaintiff offered to prove that he was the only child of Shadrach Seavey, the defendants' testate, who died in 1880. In January, 1860, the testator, owning a tract of land, and wishing to assist the plaintiff, went upon the land with him and gave him a portion of it, which the plaintiff then accepted and took possession of. The plaintiff had a note against his father upon which there was due about $200, which he then or subsequently gave up to him. Subsequently his father gave him an additional strip of land adjoining the other tract. Ever since the gifts, the plaintiff has occupied and still occupies the land, and has paid all taxes upon it. He has expended $3000, in the erection of a dwelling-house, barn, and stable, and in other improvements upon the premises. Some of the lumber for the house was given him by his father, who helped him to do some of the labor upon the house.

The defendants moved to dismiss the bill because no cause for equitable relief was stated, and because the parol contract, which is sought to be enforced, was without consideration, and is executory. The bill alleges a gift of the land to the plaintiff and a promise to give him a deed of it. The defendants also demurred, and answered denying the material allegations of the bill.

If the bill can be sustained on proof of these facts, or if not on these facts, but would be with the additional proof of a consideration for the promise, there is to be a further hearing, the plaintiff having leave to amend his bill. If on proof of these facts, either with or without proof of consideration, the bill cannot be sustained, it is to be dismissed.

SMITH, J. The bill alleges a promise by the defendants' testator to give the plaintiff a deed. The plaintiff offered to prove that the deceased gave him the land, and that he thereupon entered into possession and made valuable improvements. We assume that the plaintiff in his offer meant that he was induced by the gift of the land to enter into possession and make large expenditures in permanent improvements upon it. The evidence offered is admissible. Specific performance of a parol contract to convey land is decreed in favor of the vendee who has performed his part of the contract, when a failure or refusal to convey would operate as a fraud upon him. Johnson *v.* Bell;[1] Kidder *v.* Barr;[2] Ayer *v.* Hawkes;[3] Tilton *v.* Tilton;[4] 2 Sto. Eq. Jur., s. 761. The statute of frauds (G. L., c. 220, s. 14) provides that "No action shall be maintained upon a contract for the sale of

[1] 58 N. H. 395. [2] 35 N. H. 236, 254. [3] 11 N. H. 148, 154. [4] 9 N. H. 385, 390.

land unless the agreement upon which it is brought, or some memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized in writing." Equity, however, lends its aid, when there has been part performance, to remove the bar of the statute, upon the ground that it is a fraud for the vendor to insist upon the absence of a written instrument, when he has permitted the contract to be partly executed.

It is not material in this case to know whether the promissory note given up by the plaintiff was or was not intended as payment or part payment for the land, for equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee has made valuable improvements upon the property induced by the promise to give it. Stratton *v.* Stratton;[1] King *v.* Thompson;[2] Neale *v.* Neales;[3] Freeman *v.* Freeman; Kurtz *v.* Hibner;[4] Bright *v.* Bright;[5] Shepherd *v.* Bevin;[6] McLain *v.* School Directors;[7] Murphy *v.* Stell;[8] Bro. St. Fr., s. 491, *a*. There is no important distinction in this respect between a promise to give and a promise to sell. The expenditure in money or labor in the improvement of the land induced by the donor's promise to give the land to the party making the expenditure, constitutes, in equity, a consideration for the promise, and the promise will be enforced. Crosbie *v.* M'Doual;[9] Freeman *v.* Freeman;[10] 3 Par. Cont. 359.

Case discharged.[11]

[1] 58 N. H. 474. [2] 9 Pet. 204. [3] 9 Wall. 1, 9. [4] 55 Ill. 514.
[5] 41 Ill. 97. [6] 9 Gill, 32. [7] 51 Pa. St. 196. [8] 43 Tex. 123.
[9] 13 Ves. 148. [10] 43 N. Y. 34, 39.

[11] Beatty *v.* Kurtz, 2 Pet. 566 (gift for pious uses); Gwynn *v.* McCauley, 32 Ark. 97; Manley *v.* Howlett, 55 Cal. 94 (*semble*); Bakersfeld Association *v.* Chester, 55 Cal. 98; Anson *v.* Townsend, 73 Cal. 415 (*semble*); Wainwright *v.* Talcott, 60 Conn. 43 (*semble* — recovery of amount expended in improvements); Porter *v.* Allen, 54 Ga. 623; Hughes *v.* Hughes, 72 Ga. 173; Hughes *v.* Lindsey, 31 Iowa, 329; Bigelow *v.* Bigelow, 93 Me. 439 (*semble*); Haines *v.* Haines, 6 Md. 435 (*semble*); Hardesty *v.* Richardson, 44 Md. 617; Potter *v.* Smith, 68 Mich. 212; West *v.* Bundy, 78 Mo. 407; Dozier *v.* Matson, 94 Mo. 407; Story *v.* Black, 5 Mont. 26; Dawson *v.* McFaddin, 22 Neb. 131; Tunison *v.* Bradford, 49 N. J. Eq. 210; Syler *v.* Eckert, 1 Binn. 378; Eckert *v.* Eckert, 3 Pen. & W. 332, 362 (*semble*); Young *v.* Glendinning, 6 Watts, 509; Erie Co. *v.* Knowles, 117 Pa. 77 (*semble*); Allison *v.* Burns, 107 Pa. 50; Royer *v.* Ephrata Borough, 171 Pa. 429; Schroder *v.* Wanzor, 36 Hun, 423; School Directors *v.* Dunkelberger, 6 Barr, 29 (gift for charitable purpose); McLain *v.* School Directors, 51 Pa. 196 (gift for charitable purpose); Murphy *v.* Stell, 43 Tex. 123 (*semble*); Wooldridge *v.* Hancock, 70 Tex. 18; Johnson *v.* Townsend, 77 Tex. 636; Shobe *v.* Carr, 3 Munf. 10; Stokes *v.* Oliver, 76 Va. 72 (*semble*); Halsey *v.* Peters, 79 Va. 60; Griggsby *v.* Osborn, 82 Va. 371 (*semble*); Harrison *v.* Harrison, 36 W. Va. 556 (*semble*) *Accord.*

Forward *v.* Armstead, 12 Ala. 124; Evans *v.* Battle, 19 Ala. 398; Pinckard *v.* Poole, 23 Ala. 649; Tolleson *v.* Blackstock, 95 Ala. 510, 513 (*semble*); Rucker *v.* Abell, 8 B. Mon. 566; Usher *v.* Flood, 83 Ky. 552 (*semble*); Ridley *v.* McNairy, 2 Humph. 174 *Contra.*

In Kaufman *v.* Cook, 114 Ill. 11, an uncle wishing to make a home for his niece put her in possession of premises which he held as lessee, promising that the premises should be hers, if he succeeded in buying them. A month later he acquired the title. Although the niece made substantial improvements on the property, she was not permitted to obtain a conveyance from her uncle, for the sole reason that he did not have the title at the time she took possession. — ED.

EAST INDIA CO. *v.* VINCENT.

In Chancery, before Lord Hardwicke, C., November 14, 1740.

[*Law Reports*, 35 *Chancery Division*, 694 (*cited* [1]).]

The plaintiffs had an ancient messuage in Leadenhall Street abutting, on the north and east sides, upon a small piece of ground used as a yard in the possession of the defendant. This messuage had ancient windows on the east side overlooking such yard. The plaintiffs pulled it down and were rebuilding it, intending to make new windows not only where the old ones were on the east side, but also new windows on the north side looking on the defendant's yard, and the defendant in conversation with a director of the plaintiff company said he would oppose the making such lights unless the sashes of the windows on the east as well as on the north side were made so as not to slide, and wrinkled glass put in the lower part of such windows. But if that were done he agreed that the windows might be finished and the plaintiffs have the benefit thereof, and about the same time he applied to be employed by the plaintiffs as a packer. The windows were made as the defendant desired, and he was employed as a packer for some time and was then discharged, but was again taken into their service, and they submitted to continue him in such employment. The defendant had lately begun a building in his yard which darkened the plaintiffs' windows. The defendant pleaded the Statute of Frauds by his answer; but it was declared that the plaintiffs were entitled to the benefit of the agreement relating to the lights, and should be quieted in the enjoyment of them, being ordered to fulfil their part of the agreement, amongst other things, by employing the defendant as a packer, and the defendant was ordered at his own expense to remove the wall, and was restrained from making any other building or erection whereby the plaintiffs' said lights might be obstructed.[2]

[1] 2 Atk. 83 s. c.

[2] *Oral agreements for purchase of easements.* — Devonshire *v.* Eglin, 14 Beav. 530 (right to a watercourse); Russell *v.* Watts, 10 App. Cas. 591, 602 (easement of light); McManus *v.* Cooke, 35 Ch. Div. 681 (easement of light); Telford *v.* Chicago Co., 172 Ill. 559 (right of way); Robinson *v.* Thrailkill, 110 Ind. 117 (right of way); Joseph *v.* Will, 146 Ind. 249 (right of way); Anderson *v.* Simpson, 21 Iowa, 399 (*semble* — right to mine); Ague *v.* Seitsinger, 85 Iowa, 305 (right of way); Kent Co. *v.* Long, 111 Mich. 383 (right of way); Minn. Co. *v.* Minn. Co., 51 Minn. 304 (*semble* — right of way); Wolfe *v.* Frost, 4 Sandf. Ch. 72 (*semble* — easement of light) *Accord.* — Ed.

Oral agreement for easement of light in consideration that was built in such a way as that Pl. not entitled to. Not in S.

JACKSON *v.* CATOR.

IN CHANCERY, BEFORE LORD LOUGHBOROUGH, C., DECEMBER 5, 1800.

[5 *Vesey*, 688.]

THE plaintiff was assignee of a lease, dated the 24th of October, 1794, of certain fields, adjoining his dwelling-house at Beckenham in Kent, for thirty years; granted by the defendant; reserving all trees and timber-like trees and pollards and all plants and shrubs, that are or may be planted. In 1795 or 1796 the plaintiff laid part of the premises, to the extent of eleven or twelve acres, into a lawn and pleasure-ground; and for that purpose removed a kitchen-garden and hedge-rows at a considerable expense; planting shrubberies and making walks, etc.

The bill prayed an injunction to restrain the defendant from cutting down any of the trees upon the demised premises for the remainder of the term.

The defendant by his answer admitted he was informed by the plaintiff of his intention to make such alterations: that he (the defendant) saw the grounds while the alterations were making; and at the request of the plaintiff met his surveyor; and he stated that to oblige the plaintiff he consented that the trees the surveyor considered necessary to be cut according to the plan should be cut; and he consented generally to such alterations as the plaintiff pleased; and the trees cut were carried away by the defendant as owner.

The surveyor proved the alterations; that the land was converted from fields into a lawn and paddock, etc.; and that the cutting down the trees now left in clumps would destroy the beauty of the grounds; that the defendant met him upon the premises, and consented to cutting down some trees and leaving others in clumps, as the plaintiff should please, and seemed pleased with the plan.

An injunction had been obtained, and continued to the hearing.

The relief sought was confined to the ornamental trees upon the lawn, etc., which was laid out in the view and with the consent of the defendant. The defendant denied having an intention of cutting the trees; but he had sent a surveyor to mark them.

The *Attorney-General* [*Sir John Mitford*], *Mr. Romilly*, and *Mr. Bell*, for the plaintiff. The principle of equity is, that, when a person has stood by, seeing the act done, or has consented to it, he shall not exercise his legal right in opposition to that permission. The East India Company *v.* Vincent; Stiles *v.* Cowper.[1] In Brydges *v.* Kilburn,[2] an injunction to restrain waste was refused under the following circumstances. In 1725 a lease had been granted; and a log-

1 3 Atk. 692.

2 June 6, 1792, cited from a manuscript note, upon a motion for an injunction to restrain waste, before Mr. Justice Buller, sitting for the Lord Chancellor.

wood-mill was erected. In 1775 the lease was renewed; and in the renewed lease the mill was included under the description of a log-wood-mill. Afterwards the lessee altered it to a cotton-mill of great value. The bill was filed by the landlord, contending that the alteration of the logwood-mill to a cotton-mill, though of great value, was waste, and praying an injunction. There was no stipulation in the lease of 1725 as to what the mill should be. Upon the conduct of the plaintiff in lying by and seeing the cotton-mill erected, and afterwards approving of the defendant's planting about the mill, Mr. Justice Buller refused the injunction; and mentioned The King *v.* The Inhabitants of Butterton,[1] and other express authorities, that where a man encourages another to lay out money upon the supposition that he never means to exercise his legal rights, this court will not permit him to exercise them. That was also the opinion of the Court of Exchequer in Hardcastle *v.* Shafto.[2]

Mr. Mansfield and *Mr. Richards*, for the defendant. The cases cited are not applicable. They all go upon this: that the party was availing himself of money laid out, having permitted the other to act as if the lease he had was a good lease. In the case of the cotton-mill the answer was, that the plaintiff had suffered the defendant to lay out his money upon that project; and therefore should let it go on. In this case the plaintiff knew this defendant could exercise this right. Contemplating these improvements, why did not he enter into some communication upon the subject? Not a word passes. The right remains in exactly the same state. It is his own fault for not stipulating that these trees never should be cut. A decree restraining this clear legal right, as to which no treaty ever took place, would go farther than the court has ever gone. There is no evidence that the plaintiff would not have made a lawn, if these trees had not been on the land. It does not appear, therefore, that expense has been incurred in respect of the supposed engagement of the defendant not to cut the trees; and in that point this case is distinguished from all the others.

Lord Chancellor. I never ask more upon an application for an injunction than that a surveyor has been sent to mark out trees. I do not wait till they are cut down.

I do not feel that there is any distinction that would take the case out of the principle of all these cases that have been alluded to, and more particularly that of Brydges *v.* Kilburne. That case comes very nearly up to this, for there was a demise of the logwood-mill at a given rent. Without doubt Brydges had a right to say the defendant should not put a cotton-mill there; for it might be extremely prejudicial, bringing a manufacture there that might be extremely burthensome to the parish. The absolute right in this case goes as well to cut down all that the plaintiff plants. The reservation of the timber is in very ample terms. It would be wrong: that proposition strikes every one forcibly; not that it would be ungentlemanlike, but

[1] 6 Term Rep. B. R. 554. [2] 1 Anst. 184.

dishonest, morally wrong; binding a man of a much coarser nature than this defendant. In the case of the cotton-mill it was taking advantage of an interest created. Is it not just as competent to the court to prevent an injury arising from mere spite as to prevent him from doing it in order to put money in his pocket? The objection that the plaintiff knew the infirmity of the title, and should have taken a security, applies to all the cases; but it is very strong here, for he must have seen his intention to beautify the place could not be executed without the assent of the defendant. He acts upon it; sends his surveyor; and it is a solid improvement of the estate. The defendant has the benefit of it; ameliorating, not merely beautifying. The only question is, whether he shall be allowed to indulge his humor to exercise that right under such circumstances. I have no difficulty in enjoining him; but it is upon his conduct since the execution of the lease, not upon the evidence of the conversation as to the agreement.[1]

JERVIS *v.* SMITH AND OTHERS.

IN CHANCERY, NEW YORK, BEFORE M. HOFFMAN, ASS'T. V. C., JUNE 10, 1840.

[*Hoffman, Chancery Reports*, 470.]

THE bill was for a specific performance, and the case was submitted on written arguments.

The ASSISTANT VICE-CHANCELLOR. Jacob Smith demised the premises in question to his wife Judith Smith, and appointed Obadiah Mills and Judith Smith his executors. Both qualified, but the active duties fell upon Obadiah Mills. The latter entered into a written agreement with Jervis, for the sale of the premises to him, for the sum of $970. This agreement was dated the 19th of April, 1834, and is sufficiently proven by D. B. Bayly. The bill charges that this agreement was authorized, adopted, confirmed, and acquiesced in by Judith Smith. That in pursuance thereof, he entered into possession and cultivated the land, and spent considerable money in improvements. That he paid the sum of five dollars on account of the consideration money to Mills, and prepared a bond and mortgage before the day fixed for completing the agreement. It is also alleged in the bill, that after the expiration of the time fixed for the per-

[1] Dann *v.* Spurrier, 7 Ves. 231, 235 (*semble*); Powell *v.* Thomas, 6 Hare, 300; Rochdale Co. *v.* King, 16 Beav. 630; Cotching *v.* Bassett, 32 Beav. 101; Plimmer *v.* Mayor, 9 App. Cas. 699 *Accord*.

In Dann *v.* Spurrier, *supra*, Lord Eldon said: "This court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement; a lessor knowing and permitting those acts, which the lessee would not have done, and the other must conceive he would not have done, but upon an expectation that the lessor would not throw an objection in the way of his enjoyment." — ED.

formance, a parol agreement was made between the complainant and Mills for an extension of the time, by which it was extended from the 1st of November, 1834, to the 1st of May, 1835. That if the complainant paid $400 by the 1st of May, his property at the west end of the village of Jamaica should not be covered by the mortgage. The bill also states what is termed a further extension of the time to the 6th or 7th of May. That on the 4th of May he was at the county clerk's office, where the business had been transacted, and was told that the time had expired.

Judith Smith conveyed the land to Samuel D. Mills, who conveyed to one Richardson, by deed dated the 30th of June, 1835, for $1800. No part of the consideration was paid, but a mortgage executed for the whole. Richardson has taken possession of the land. Judith Smith had, prior to the first of May, executed and acknowledged a deed to the complainant for the land, which has since been destroyed. The bill also states an offer on the 4th of May, to procure the whole purchase money, and pay it.

The defendant Richardson expressly denies notice of the written agreement made by Obadiah Mills, or of any verbal agreement when he purchased. The testimony of Mackniel goes some way to contradict his answer; but I cannot say that it is sufficient to overthrow it, and there is no other witness. Hence no relief can in any event be had against Richardson. He does not stand as a purchaser fraudulently interfering with the equitable rights of another, of which he had notice. Wadsworth *v.* Wendall.[1] As this result puts an end to the claim for a specific execution of the alleged agreement by a conveyance of the land, and this fact was known to the complainant when he filed the bill, the question arises whether he must not be left to his action at law.

In Wiswall *v.* McGowan and others,[2] I examined this point. There a party had made a contract to sell land, and afterwards conveyed it to another. The conveyance was dated and acknowledged before the bill was filed, but not recorded until subsequently. No notice of the conveyance was proven, and the bill stated that the complainant had none. No notice of *lis pendens* had been filed, and an attempt to charge the purchasers with personal notice entirely failed. They were brought before the court by supplemental bill. It was held that the bill could be sustained against the vendor, and that damages could be assessed by a master for his violation of the contract.

In this case, however, the bill was filed after the conveyance, and with knowledge of it. The reply to this objection is, that this is a case of exclusive equity jurisdiction. No action could be sustained at law, even supposing that all the acts of part performance were duly proven.[3] See Kidder *v.* Hunt;[4] Jackson *v.* Pierce.[5] The party is

[1] 5 Johns. C. R. 231.

[2] October, 1839.

[3] Cooth *v.* Jackson, 6 Ves. 12, 39; O'Herlihy *v.* Hedges, 1 Sch. & Lef. 123, 130; Johnson *v.* Hanson, 6 Ala. 351; Henry *v.* Wells, 48 Ark. 485; Eaton *v.* Whitaker, 18 Conn. 222.

[4] 1 Pickering, 328.

[5] 2 Johns. Rep. 221.

without redress except he can obtain it here; and therefore I consider it immaterial when the vendor conveyed so as to put it out of his power to perform specifically, or whether the plaintiff when he filed his bill knew of the conveyance. If the only redress is in this court, and the contract would have been enforced had the property remained in the vendor, it follows that damages may be recovered through the instrumentality of this court. I must therefore examine the case as to the defendant Judith Smith, as if the property had not been conveyed by her.

The bill must be dismissed, but without costs.[1]

MULLET *v.* HALFPENNY.

In Chancery, before Sir John Trevor, M. R., February 9, 1699.

[*Precedents in Chancery*, 404 (*cited* [2]).]

The defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing, comprising the terms of the agreement; and afterwards designing to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humor and get the plaintiff to deliver up that writing, and then to marry him, which she accordingly did, and the defendant stood at the corner of a street to see them go by to be married, and afterwards forced the plaintiff to bring his bill in this court to be relieved: and my Lord Chancellor [Cowper] said he remembered very well that this cause was heard before the Master of the Rolls, and the plaintiff had a de-

231; Fleming *v.* Carter, 70 Ill. 286; Wheeler *v.* Frankenthal, 78 Ill. 124; Creighton *v.* Sanders, 89 Ill. 543; Dougherty *v.* Catlett, 129 Ill. 431; Chicago Co. *v.* Davis Co., 142 Ill. 171; Leavitt *v.* Stern, 159 Ill. 526; Barickman *v.* Kuykendall, 6 Blackf. 21, 24; Freeport *v.* Bartol, 3 Me. 340; Norton *v.* Preston, 15 Me. 14; Kidder *v.* Hunt, 1 Pick. 328; Thompson *v.* Gould, 20 Pick. 134, 138; Adams *v.* Townsend, 1 Met. 483; Jacobs *v.* Peterborough Co., 8 Cush. 223, 224; Bartlett *v.* Bartlett, 103 Mich. 293; Payson *v.* West, 1 Miss. 515; Nally *v.* Reading, 107 Mo. 350 (affirming s. c. 36 Mo. Ap. 306); Lane *v.* Shackford, 5 N. H. 130, 132; Jackson *v.* Pierce, 2 Johns. 221; Abbott *v.* Draper, 4 Den. 51, 53; Russell *v.* Briggs, 165 N. Y. 500, 509; Thomas *v.* Dickinson, 14 Barb. 90; Davis *v.* Moore, 9 Rich. 215; Brown *v.* Pollard, 89 Va. 696, 701 *Accord.*

Walker *v.* Walker, 1 Whart. 292; Follmer *v.* Dale, 9 Pa. 83 *Contra.*

In O'Herlihy *v.* Hedges, *supra*, Lord Redesdale said: "But this is a contract on which no action at law could be maintained, notwithstanding what Mr. Justice Buller says in one or two cases [Brodie *v.* St. Paul, 1 Ves. Jr. 326, 333], that part performance takes a case out of the statute, at law as well as in equity. That opinion will be found wrong; and I recollect Mr. Justice Buller, upon being pressed with the consequences of that opinion in case of a demurrer to evidence, being obliged to abandon the position. The ground on which a court of equity goes in cases of part performance is that sort of fraud which is cognizable in equity only." — Ed.

[1] The bill was dismissed because the court found that the plaintiff had taken possession without the authority of the defendant. The court's discussion of this point is omitted. — Ed.

[2] 2 Vern. 373 s. c. — Ed.

cree; but he said this was on the point of fraud, which was proved in the cause, and Halfpenny walked backwards and forwards in the court and bid the Master of the Rolls observe the statute, which he humorously said, "I do, I do."[1]

[1] Other instances of specific reparation for actual fraud by a compulsory conveyance of the land promised are cited *supra* 275, n. 1, last paragraph.

Lord North expressed the opinion in two early cases, Leak *v.* Morrice, 2 Ch. Ca. 135, and Hollis *v.* Whiting, 1 Vern. 151, that a failure to comply with a promise to reduce the oral contract to writing was such misconduct as to take the case out of the statute. But this opinion has been overruled. Whitechurch *v.* Bevis, 2 Bro. C. C. 565; Wood *v.* Midgley, 5 D. M. & G. 41; Wilson *v.* Ray, 13 Ind. 1; Finucane *v.* Kearney, Freem. (Miss.) 65, 69; Box *v.* Stanford, 21 Miss. 93.

But see Equitable Co. *v.* Baltimore Co., 63 Md. 285; Wooldridge *v.* Scott, 69 Mo. 669, 674; Walford *v.* Herrington, 74 Pa. 311.

Sales under Direction of the Court are not affected by the Statute of Frauds. Atty.-Gen. *v.* Day, 1 Ves. Sr. 218, 220; Blagden *v.* Bradbear, 12 Ves. 466, 472; *Ex parte* Cutts, 3 Dea. 242, 267. — Ed.

SECTION VIII.

Plaintiff's Default or Laches as a Bar to Relief.

THE EARL OF FEVERSHAM *v.* WATSON.

In Chancery, before Lord Finch, C., Easter Term, 1678.

[*Freeman, Chancery Cases*, 35.[1]]

The plaintiff married one of Sir George Sands's daughters, and upon the marriage it was agreed by articles, that the plaintiff should settle £500 *per ann.* for separate maintenance, and should do several other things; and likewise should purchase £840 *per ann.* within twenty miles of London and settle it upon himself for life, remainder to his intended wife for life, with remainders over.

And Sir George Sands did article, so soon as the plaintiff should perform the premises, that he would settle £3000 *per ann.* upon the plaintiff for life, remainder to his wife for life, and so to the first and tenth son.

The plaintiff did perform all that was to be done of his part, except the purchasing of the £840 *per ann.*, and before that was done his wife died without issue.

The plaintiff preferred his bill against the defendant, who married the other daughter and heir of Sir George Sands, to have the estate of £3000 *per ann.* executed to him for life according to the articles, having performed all of his part but the settling of the £840 *per ann.*, and in that he was prevented by the death of his wife, and it was likewise proved, that Sir George Sands did say in his lifetime, that it should be no prejudice to the plaintiff, although he had not yet purchased the £840 *per ann.*, but should take his own time for doing of it, and a great many expressions of this kind from Sir George were proved, and were insisted upon by the plaintiff's counsel to be in the nature of dispensations with the performance of that part of the agreement.

But the court *seriatim* delivered their opinions against the plaintiff, for that what was to be done by the plaintiff was in the nature of a condition precedent, and ought to have been done wholly, before the defendant was obliged to do what was to be done on his part; and as here the plaintiff could not bring his action of covenant at law, without averment of performance of the condition precedent; so neither shall he in equity have an execution of the estate, without doing that which by the agreement of the parties ought first to be done, and the

[1] Cas. temp. Finch, 445 s. c. — Ed.

that the purchase money shall be paid and the contract completed on a certain day, this court in ordinary cases has established the principle that time is not of the essence of the contract, and that the circumstance of the day fixed for the payment of the money and completion of the purchase being past does not entitle either party to refuse to complete. On the other hand, it is well settled that where there is a contract between the owner of land and another person, that if such person shall do a specified act, then he (the owner) will convey the land to him in fee; the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified. The court regards it as the case of a condition on the performance of which the party performing it is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly. Therefore, if there be a day fixed for its performance, the lapse of that day without its being performed prevents him from claiming the benefit. Applying that rule to the present case: if the agreement fixes a day for the payment of the money, then it is clear that if that day is past without the payment, the right to compel a conveyance is lost.

The question then is, whether any time is fixed in this agreement for the payment of the money. The language is, that if the lessees shall at the expiration of three months after the notice (which notice was duly given) pay the money, *then* the lessor shall convey the freehold and inheritance; and the matter resolves itself into a question of construction, — What is the meaning of the words "at the expiration of three months?"

The plaintiffs contend that these words mean, not *at* the time at which the three months expire, but at any time afterwards. If that be the true construction, the consequence would be, that not only a day or a week after, but a year or any number of years after the expiration of the three months, the plaintiffs would have a right to tender the money and demand a conveyance; and this is what the law will not permit. But besides that, if the lessees should think fit not to pay the money, could the owner file a bill to compel them to do so? I apprehend, clearly not; for there is nothing in the agreement to make it obligatory on the lessees to pay the money. It is impossible to put such a construction on the words. "At the expiration of three months" must mean, not at any time after such expiration, but on the day on which the three months expire.

This case is not open to the argument which might arise in ordinary cases between vendor and purchaser, that the investigation of the title would occupy some time, inasmuch as the agreement provides that the lessees shall accept the title; so that there was nothing to be done but the conveyance. Unfortunately for the plaintiffs, they have allowed the time limited for the payment of the money to elapse, and therefore they are not entitled to a conveyance.

Bill dismissed, with costs.[1]

[1] In accordance with the principal case it is generally agreed that the holder of an option

GEORGE GANNETT *v.* MARGARET ALBREE.

SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1869.

[103 *Massachusetts Reports*, 372.]

BILL in equity for specific performance of an agreement to renew the lease of a dwelling-house numbered 28 on Pemberton Square in Boston.

At the hearing in this court, before Morton, J., it appeared that the defendant demised the premises to George W. Bassett for the term of three years from August 1, 1866, by an indenture in which the lessee covenanted not to lease nor underlet the premises, nor permit any other person or persons to occupy or improve the same without the written approbation of the lessor, and the lessor agreed that the lessee should have the right to renew the lease at his option for the term of two years; that on the indenture, before its delivery, was made the following indorsement under the hand and seal of the defendant: "In case the lessee shall cease to occupy the premises as a residence, he shall have the right to underlet the same for the remainder of the term, to any respectable person, to be used strictly as

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that the purchase money shall be paid and the contract completed on a certain day, this court in ordinary cases has established the principle that time is not of the essence of the contract, and that the circumstance of the day fixed for the payment of the money and completion of the purchase being past does not entitle either party to refuse to complete. On the other hand, it is well settled that where there is a contract between the owner of land and another person, that if such person shall do a specified act, then he (the owner) will convey the land to him in fee; the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified. The court regards it as the case of a condition on the performance of which the party performing it is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly. Therefore, if there be a day fixed for its performance, the lapse of that day without its being performed prevents him from claiming the benefit. Applying that rule to the present case: if the agreement fixes a day for the payment of the money, then it is clear that if that day is past without the payment, the right to compel a conveyance is lost.

The question then is, whether any time is fixed in this agreement for the payment of the money. The language is, that if the lessees shall at the expiration of three months after the notice (which notice was duly given) pay the money, *then* the lessor shall convey the freehold and inheritance; and the matter resolves itself into a question of construction, — What is the meaning of the words "at the expiration of three months?"

The plaintiffs contend that these words mean, not *at* the time at which the three months expire, but at any time afterwards. If that be the true construction, the consequence would be, that not only a day or a week after, but a year or any number of years after the expiration of the three months, the plaintiffs would have a right to tender the money and demand a conveyance; and this is what the law will not permit. But besides that, if the lessees should think fit not to pay the money, could the owner file a bill to compel them to do so? I apprehend, clearly not; for there is nothing in the agreement to make it obligatory on the lessees to pay the money. It is impossible to put such a construction on the words. "At the expiration of three months" must mean, not at any time after such expiration, but on the day on which the three months expire.

This case is not open to the argument which might arise in ordinary cases between vendor and purchaser, that the investigation of the title would occupy some time, inasmuch as the agreement provides that the lessees shall accept the title; so that there was nothing to be done but the conveyance. Unfortunately for the plaintiffs, they have allowed the time limited for the payment of the money to elapse, and therefore they are not entitled to a conveyance.

Bill dismissed, with costs.[1]

[1] In accordance with the principal case it is generally agreed that the holder of an option

GEORGE GANNETT *v.* MARGARET ALBREE.

SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1869.

[103 *Massachusetts Reports*, 372.]

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a private dwelling, and not for any public or objectionable purpose;" and that on September 12, 1866, Bassett, with the written consent of the defendant, assigned the premises and all his interest therein to the plaintiff. It also appeared that the premises "from the time of the assignment till April 9, 1868, were used and occupied by the plaintiff, in connection with his school for young ladies, for sleeping-rooms, with the knowledge and consent of the defendant; that on or about April 9, 1869, the plaintiff leased the same to Lucy E. Small, for the unexpired term of the lease, for the purposes of a boarding-house, though not mentioned in the written lease, reserving to himself one room which had been occupied by his brother, a clergyman, as a sleeping-room; that Small occupied the house for a boarding-house, using a portion of the house for her own family, and the balance for boarders who lodged in the house; and that the plaintiff agreed that, when he obtained a renewal of the lease from the defendant, he would renew the lease for the same term to Small."

The judge ruled "that such use of the house was in violation of the provisions of the lease and the agreement, and, by reason thereof, declined to order a specific performance of the agreement" for renewal, and reported the case for the determination of the full court.[1]

AMES, J. By the terms of the lease, the lessor had a right to insist that the house should be occupied as a residence, and used "strictly as a private dwelling," and not for any "public or objectionable purpose." When the lease was assigned to the plaintiff, he took it subject to all the covenants which it reserved or contained, to be kept and fulfilled on the part of the original lessee. The consent of the lessor that the plaintiff might occupy and use the house himself, in connection with his school for young ladies, cannot fairly be construed as a general or absolute waiver of the limitations as to the nature of the occupation. It is not the case of a condition which, when once dispensed with, is discharged for all purposes, and cannot be revived, but of a covenant which can be modified by consent. The lessor might be willing to consider such a use of the house as not an entire departure from its intended character of a private dwelling, and not an appropriation to a public or objectionable purpose. But its conversion into a public boarding-house is an entirely different matter. In making the original lease, with its restrictions, the lessor may have supposed that such a use would subject the house to greater wear and tear, or to greater depreciation in value, or require more frequent repairs, or increase the rate of insurance. All these considerations may have had their influence upon her mind as to the rate of the rent and the length of the term. The use of the house as a boarding-house is in violation of the terms of the lease, and would subject it to very different conditions. For that reason, the plaintiff is not entitled to a decree for the specific performance of the contract for its renewal. *Bill dismissed, with costs.*

[1] The arguments are omitted. — ED.

[2] In the following cases the plaintiff's breach of contract defeated his claim of specific

BEAUMONT *v.* DUKES.

IN CHANCERY, BEFORE SIR T. PLUMER, M. R., FEBRUARY 21, 1822.

[*Jacob*, 422.]

THIS was a bill for a specific performance; the subject of the contract was a piece of building-ground in George Street, Stepney, being lot 77, of premises in the neighborhood, sold by auction in April, 1812. The defendant was the purchaser of this lot at the price of 78*l*. In his answer he stated that the approach to George Street from Mile End Road was by a very narrow and dirty lane, called White Horse Lane, and that the auctioneer at the sale declared that the plaintiff intended to make the lane wide and commodious, and also to make a new street from George Street to Mile End Road; he said that he was induced to purchase in the confidence that these improvements would take place as they would much increase the value of the land, but that the plaintiff had not taken any steps towards effecting the alterations, and that he had converted part of the ground, over which the proposed new street was to have passed, into a farmyard.[1]

The MASTER OF THE ROLLS.

It is fairly admitted that the Court, having a discretion either to grant a specific performance, or to leave the parties to law, if the fact be established that any fraud is to be imputed to the vendor, or if there has been any mistake or surprise that operates in conscience against his demand to have the contract performed, it is an answer to him. The defendant here has made two objections in his answer: first, that the plaintiff's title was imperfect; and, secondly, that he purchased on the faith of representations made at the auction by the plaintiff's agent, which considerably enhanced the price, but which, in the event, have not been fulfilled. As to the first point, it appears that the title is now complete, though it was not at the time of filing the bill; that, however, goes to costs only, and not to the main point of specific performance.

performance of the defendant's agreement. Tildesley *v.* Clarkson, 30 Beav. 419 (defendant agreed to accept a lease of an unfinished house, plaintiff agreeing to finish it); Reeves *v.* Greenwich, 2 H. & M. 54 (defendant agreed to accept a lease, plaintiff agreeing to procure a license to carry on a certain trade); Lamare *v.* Dixon, L. R. 6 H. L. 414 (defendant agreed in writing to accept a lease, plaintiff agreeing orally to put premises in a proper condition for a wine cellar); Thorp *v.* Pettitt, 16 N. J. 488 (defendant agreed to execute a lease, plaintiff agreeing to give security for performance of his covenants as lessee); Bodwell *v.* Bodwell, 66 Vt. 101 (defendant agreed to live apart from plaintiff and to release all claim on his property, plaintiff agreeing to pay her $300, and to let her have certain furniture and the custody of their son. Plaintiff paid the money, but did not permit defendant to have custody of the son).

In Gibson *v.* Goldsmith, 5 D. M. & G. 757, reversing s. c. 18 Beav. 584, a defendant who had transferred shares in a firm, covenanting to perfect the title, in exchange for a covenant of indemnity against liability as a partner, was compelled to perfect the title, although the plaintiff had broken the contract of indemnity. — ED.

1 The statement of the case is abridged. — ED.

As to the second point, it is unfortunate that the paper read at the sale has been lost. Its contents are, however, supplied by the memory of the auctioneer; and the first observation that arises is, that the subject of the representations was not a future project contemplated by a third person. If that had been the case, the plaintiff might have held out the expectations with a degree of uncertainty as to whether they would be fulfilled. If he had said merely that a plan was in contemplation, that would not have been an undertaking to do anything himself; it would only be holding out a hope as to the future conduct of a third person, not under his control; and it would be the fault of the bidder if he relied on so loose and vague a report. But here the representation went to induce a belief that the plan was in contemplation by himself; we must take it as a statement of what he intended to do himself.

The ground was described as building-ground in a street, and the value of the lot must, of course, depend very much upon the communication to it. The representation that was made was, therefore, calculated to enhance the price: and we must consider it to have been meant, not merely as a loose statement, but to operate on the sale; the auctioneer is authorized to announce it, and a plan, showing the alteration intended, is put into the hands of the bidders. In one respect, indeed, it is overstated in the answer; for it appears that the plaintiff was not the owner of the land on which the improvement was to be made. This makes a difference as to the certainty of the plan being carried into execution: but he appears to have represented that if he was not the owner, he was about to become so, and that, if necessary, he would even apply to parliament, to overcome any obstacles that might intervene. Surely, then, he held it out to them as a plan with respect to which he was in earnest, and which, in his judgment, was practicable. Then, was he sincere in this? It does not appear that from that time he has taken any step to realize it. When the objection was made in the answer, the onus of showing what steps he had taken, and what had prevented him from completing the improvement, lay upon him. He has not proved it, and we must therefore assume that he has done nothing. Is this keeping good faith with those who listened to his statements? It is perfectly consistent with everything which appears, that this might only have been a plan upon paper, made use of to allure purchasers, without any design of carrying it into effect.

It comes to this, that the representation stated by the auctioneer was made by the directions of the plaintiff, and that it influenced the purchase; the defendant swears that he bought upon the faith of it; and from the nature of the subject it is reasonable to suppose that he did. I think this does afford a ground for saying that the plaintiff is not entitled to the specific performance of a contract thus obtained. It must stand or fall to the full extent; we cannot cut down the price, and say how much would have been given if this had not been done. The statement made was not the loose puffing of an auctioneer, but a

written declaration by the vendor himself. The contract was obtained by representations made by the vendor as to his future plans, which he has not performed, and it cannot, therefore, be executed by a court of equity.

Bill dismissed, with costs.[1]

BELLAMY *v.* DEBENHAM.

In the Court of Appeal, January 16, 1891.

[*Law Reports*, [1891] 1 *Chancery*, 412.]

Lindley, L. J.[2]

This is an appeal by a vendor who seeks specific performance of an agreement alleged to have been entered into by the defendant for the purchase from the plaintiff of a house at Cheshunt, and asks in the alternative for damages if he cannot obtain a decree for specific performance.

The contract between the parties is to be found, if at all, in a series of letters which have been read and carefully considered by all of us. Having regard to the point to which I will allude presently, I do not think it necessary to spell through those letters for the purpose of seeing whether they do or do not amount to a concluded agreement. I have, to say the least, very considerable doubt about it. Looking at the whole correspondence, which we are bound to do in order to see whether the two or three letters fixed upon by the vendor amount to a concluded contract, I think that having regard to the vendor's letter of the 14th of May there is very considerable doubt about that point. I shall, however, assume that the letters do amount to an agreement for the sale and purchase of this property, and I will consider whether on that assumption the plaintiff is entitled to specific performance, and if not whether he is entitled to damages for breach of contract.

The position of affairs is this. The contract, if there was one, was a contract for the sale of this house at the price of £800, the house being treated as freehold, since there is nothing to the contrary mentioned in any of the letters. There was in terms no day fixed for completion, but the contract was made in April, 1889, and the 24th of June was the time fixed for the delivery of possession. Now, having regard to the nature of the property, to the time which had elapsed, and to that stipulation about possession, it appears to me that the 24th of June was the end of a reasonable time for completing the contract. I do not think that any judge would say that a longer time for completion ought to be allowed.

1 Lamare *v.* Dixon, L. R. 6 H. L. 414, 428, *per* Lord Cairns; Myers *v.* Watson, 1 Sim. N. S. 523, 529 *Accord.* — Ed.

2 Only the judgment of Lindley, L. J., is given. Lopes and Kay, L. JJ., delivered concurring judgments. — Ed.

Now the real truth was that this was not an ordinary freehold house. It was a house built upon a piece of land containing about a quarter of an acre which was formerly copyhold, and which had been enfranchised. Under the Copyhold Acts, the mines, minerals, clay, gravel, &c., were reserved to the lord of the manor, and did not belong to the vendor. The defendant, it is said, was a person well acquainted with the locality. He is an old auctioneer, whose name is familiar to us all, and it is said that he knew this was enfranchised land. He probably did know that; but that would not acquaint him with the fact that the minerals had not been acquired by the vendor, and there is nothing to show that he knew that he was buying anything else than an ordinary freehold house. It is plain that the vendor had not got what he contracted to sell. The purchaser does not see that until the abstract is sent in, and when it is sent in he says, "I shall not complete." The defendant's solicitor, in his letter of the 20th of May says, that as the plaintiff cannot give his client the mines and minerals, he cannot advise his client to complete, and that advice is communicated to the client and adopted by him. It appears to me, therefore, that there was on the 20th of May a plain repudiation on the part of the defendant of all liability to complete, and he has never flinched from that position.

Now what effect has that upon the plaintiff's right to specific performance? I shall not go through the authorities, but shall content myself by saying, that having regard to the cases of Hoggart *v.* Scott,[1] Forrer *v.* Nash,[2] *In re* Head's Trustees and Macdonald,[3] and Weston *v.* Savage,[4] the purchaser was justified in taking up that position and saying, "I will not complete." That appears to me to be a complete answer on the case of specific performance.[5]

Now, as to damages, I am not sure that the repudiation on the 20th of May is by itself an answer to the plaintiff's claim for damages. The plaintiff had, if I am right in the assumption I have made, a time allowed for completion which did not expire until the 24th of June, and if he had been ready and willing on the 24th of June to complete his contract and to give to the defendant such a conveyance as the

1 1 Russ. & My. 293. 2 35 Beav. 167. 3 45 Ch. D. 310. 4 10 Ch. D. 736.

5 Tendring *v.* London, 2 Eq Ab. 680, pl 9; Forrer *v.* Nash, 35 Beav. 167; Hoggart *v.* Scott, 1 Russ. & My. 293, 295 (*semble*); Weston *v.* Savage, 10 Ch. D. 736; Brewer *v.* Broadwood, 22 Ch. D. 105; Wylson *v.* Dunn, 34 Ch. D. 569, 577; Lee *v.* Soames, 36 W. R. 884 *Accord.*

In Forrer *v.* Nash, *supra*, Sir John Romilly, M. R., said, p. 171: "I am of opinion that when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, as soon as he finds that to be the case, may say, 'I will have nothing to do with it.' The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join in making a good title to the property sold."

The decisions and *dicta* in Norris *v.* Fox, 45 Fed. R. 406; Luse *v.* Deitz, 46 Iowa, 205; Ten Eyck *v* Manning, 52 N. J. Eq. 47, 51; Ley *v.* Huber, 3 Watts, 367, 368; Moss *v.* Hanson, 17 Pa. 379, 382, are probably to be explained upon the doctrine of the principal case. But the facts are not adequately reported, and the courts appear to have decided against the plaintiff under the impression that the cases were governed by the principle of mutuality of equitable relief. — Ed.

defendant was entitled to, I am not prepared to say that the defendant would not have been liable to damages if he refused to complete.[1]

But what are the facts? The facts are, that on the 24th of June the plaintiff had no more got the property than he had in April. He had begun to negotiate for it; but he did not get it until September. If you look at this action, therefore, as an action by the vendor for damages for non-completion, the purchaser's defence is, "You the vendor were not in a position at the time for completion to give me that which I bargained for." That is a complete defence to an action at law for damages.

It appears to me, therefore, that both the equitable remedy and the legal remedy fail, and the appeal ought to be dismissed.

PARKIN *v.* THOROLD.

In Chancery, before Sir John Romilly, M. R., May 22, 1852.

[16 *Beavan*, 59.]

On the 25th of July, 1850, the plaintiff agreed to sell to the defendant a freehold estate. The abstract was to be delivered within ten days, and by the fifth condition of sale it was stipulated as follows: The purchaser shall pay a deposit, "and sign an agreement for completing the purchase and for payment of the residue of the purchase money on or before the 25th of October next," at the office of Mr. F., "at which time and place the purchase is to be completed."

The seventh condition provided, "that in case the completion of the purchase, through the default of the purchaser, shall not take place on the 25th of October next, the purchaser shall pay interest, at five per cent., up to the time of actually completing the purchase."

The fifteenth condition provided, that if the purchaser "should neglect or fail to comply with the conditions and to complete his purchase by the time and in manner aforesaid," his deposit should be forfeited to the vendor, who should be at liberty to resell, etc.

The conditions were signed by both parties, and the deposit paid.

The abstract was delivered, but difficulties arose, in consequence of a settlement dated in 1804 having been mislaid. A correspondence took place respecting it, and on the 17th of October the vendor's solicitor stated: "I only require time to be able to find the settlement. I believe I have found out where it is."

On the 21st of October the purchaser's solicitor gave notice that unless the settlement were produced and the other requisitions satisfied on or before the 5th of November, he would treat the contract as at an end, and require a return of the deposit.

[1] Lopes, L. J., declined to express any opinion whether such an action would lie, but added, "I have very grave doubts in my own mind whether it would." — Ed.

On the 7th of November the deposit was formally demanded. The vendor, on the 8th of January, 1851, offered to produce the deed, but the purchaser then stated that he had long abandoned the contract, and on the 28th of February, 1851, he brought an action for the recovery of the deposit. On the following day (1st of March), the vendor instituted this suit for the specific performance of the contract.

On a motion to dissolve the common injunction to stay the proceedings at law, Lord Cranworth, holding that time was at law and in equity of the essence of the contract, and that it had not been waived, dissolved the injunction.[1] The action went on, but was afterwards discontinued, and the cause now came on for hearing.[2]

The Master of the Rolls. The case appears to me to be resolvable into the following questions: The first is, whether time was of the essence of this contract; if it was, the contract was not performed within the time. If it be determined that time was an essential part of the contract, then a second question will arise, whether this part of the contract was waived by the defendant. If it be determined that time was not originally of the essence of the contract, the next question will be, whether the notice of the 21st of October, specifying the 5th of November as the time for the completion of the contract, made that time an essential part of the contract, or if not, whether the conduct of the plaintiffs, by acquiescence in that notice, or by laches in not actively enforcing their rights, have deprived them of any right to relief in this court.

Upon the first question there is no great difficulty in stating the rule, although there may be considerable in applying it to the facts of individual cases. At law, time is always of the essence of the contract. When any time is fixed for the completion of it, the contract must be completed on the day specified, or an action will lie for the breach of it. This is not the doctrine of a court of equity; and although the dictum of Lord Thurlow, that time could not be made of the essence of the contract in equity, has long been exploded, yet time is held to be of the essence of the contract in equity, only in cases of direct stipulation, or of necessary implication. The cases of direct stipulation are, where the parties to the contract introduce a clause expressly stating that time is to be of the essence of the contract. The implication that time was of the essence of the contract is derived from the circumstances of the case, such as where the property sold is required for some immediate purpose, such as trade or manufacture; or where the property is of a determinable character, as an estate for life. It is needless to refer to the authorities, which are numerous, to support these propositions. Unless I am wholly mistaken, they establish that unless in the cases of direct stipulation, or of necessary implication, time is not considered in courts of equity to form such a portion of the contract as either party can treat to be an essential part of it.

[1] See 2 Sim. (N. S.) 1.

[2] The arguments and a portion of the judgment are omitted. — Ed.

Against this, it was argued that the later decisions of the court had, in a great measure, destroyed this distinction between law and equity; that the distinction itself rests on no very intelligible grounds, and is opposed to the provisions of the Statute of Frauds; that a contract must be construed alike at law and in equity, and that a contract to purchase, conditionally, upon a title being made by a given day, cannot be converted into a contract to purchase, provided the title be made out at some day other than that specified in the contract; and that consequently, a court of equity, unless it considers time to be of the essence of the contract in all cases, will be enforcing a contract other than that which has been actually entered into.

I do not concur in this view of the subject. A contract is undoubtedly construed alike both in equity and at law; nay more, a court of law is the proper tribunal for determining the construction of it; and if a serious doubt should arise as to the effect of the words contained in a contract, a case would be directed to a court of law for its opinion[1] as to the true construction to be put upon the words, which construction would be adopted in equity. But courts of equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if it find that by insisting on the form the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance. For instance, A. has contracted to sell an estate to B., and to complete the title by the 25th October; but no stipulation is introduced that either party considers time of the essence of the contract. A. completes the title by the 26th; at law the contract is at an end, and B. may bring an action for the non-performance of the contract, and obtain damages for the breach; but equity holds that unless B. can show that the delay of twenty-four hours really produced some injury to him, he is not to be permitted to bring this action, or to avoid the performance of the contract; not certainly on the ground that the 25th of October was not a part of the contract, but on the ground that it is unjust that B. should escape the performance of a contract, which has been substantially performed by A., by reason of some omission in a formal but immaterial portion of it.

The jurisdiction of equity in the execution of the specific performance of contracts accordingly is eminently discretionary; it will not enforce a contract where doing so would be productive of peculiar hardship on one party to it. This was acted upon lately by the Lords Justices in the case of Webb *v.* The Direct London and Portsmouth Railway Company.[2] Neither will equity enforce a contract, where, though the court considers the title good, yet considers it sufficiently doubtful that it might reasonably give rise to litigation hereafter between the purchasers and persons not bound by the decree of the court in the suit for specific performance. It is, I apprehend, on a similar principle that the court has regarded the question of time in

[1] Cases to law have since been abolished, see 15 & 16 Vict. c. 86, s. 61.
[2] 1 De G. M. & G. 521, and 9 Hare, 129.

these matters, when it has not been specifically and precisely contracted for, as an essential clause in the contract. It then considers how far either party is injured by the delay, and will not permit one to insist upon that which, although a formal part of the contract, would, in reality, defeat the object which both had in view at the time when it was made. It is, I apprehend, on a similar principle, also, that the whole doctrine relating to equities of redemption, as administered by this court, is founded. The contract between the mortgagor and mortgagee is precise; if the money and interest is not repaid on the day twelve-month on which the mortgage is made, the estate is to be the property of the mortgagee: the contract is positive and unambiguous, but a court of equity will not permit that contract to be enforced, and will restrain the parties from enforcing it at law. It treats the substance of the contract to be a security for the repayment of money advanced, and that portion of the contract which gives the estate to the mortgagee as mere form; and accordingly, in direct violation of the contract, it compels the mortgagee, so soon as he has been repaid his principal money and interest and the costs he has been put to, to restore the estate: and this, although the parties have acted on the contract, and the mortgagee has taken possession on the day when default arose, and has continued in possession for many years; in truth, as a general rule it may be said, any number of years not exceeding twenty, acknowledging no title in the mortgagor.

I am of opinion, therefore, that the later decisions of the court have not altered the doctrine I have stated as to the cases where time is of the essence of the contract.

I turn therefore to this contract, for the purpose of examining it by the principles I have already laid down. In the first place, the time specified is not, by express words, made an essential part of it. This was, in truth, admitted at the bar and could not be denied; nay, more, the seventh condition of sale appears to me to be inconsistent with such a proposition, even if any such could have been maintained on the rest of the contract; and except that it is confined to the default of the purchaser, it is the condition which, in the precedents at the end of the larger edition of Vendors and Purchasers, is suggested as proper to be introduced, when it is intended by both parties that time shall not be of the essence of the contract.[1]

[1] *Specific performance required of buyer notwithstanding delay of seller.* — In accordance with the principal case relief was given against the buyer in the following cases, although the seller was not ready to perform at the appointed time: Langford *v.* Pitt, 2 P. Wms. 629; Gibson *v.* Patterson, 1 Atk. 12 (explained in Harrington *v.* Wheeler, 4 Ves. 689); Pincke *v.* Curteis, 4 Bro. C. C. 329; Fordyce *v.* Ford, 4 Bro. C. C. 494; Hertford *v.* Boore, 5 Ves. 718; Wynn *v.* Morgan, 7 Ves. 202; Seton *v.* Slade, 7 Ves. 264; Radcliffe *v.* Warrington, 12 Ves. 326; Taylor *v.* Brown, 2 Beav. 180; Shepheard *v.* Walker, 20 Eq. 659; Hepburn *v.* Dunlop, 1 Wheat. 196 (*semble* — plaintiff barred by a previous decree); Watts *v.* Waddle, 6 Pet. 389 (*semble*); Gunton *v.* Carroll, 101 U. S. 426; Townsend *v.* Vanderwerker, 160 U. S. 171; Longworth *v.* Taylor, 1 McL. 395; Raymond *v.* San Gabriel Co., 53 Fed. R. 883; Brumfield *v.* Palmer, 7 Blackf. 227; Woodson *v.* Scott, 1 Dana, 470; Tapp *v.* Nock, 89 Ky. 414; Scarlett *v.* Stein, 40 Md. 512; Dresel *v.* Jordan, 104 Mass. 407; Sharp *v.* Trimmer, 24 N. J. Eq. 422; Seymour *v.* De Lancey, 3 Cow. 445; Pierce *v.* Nichols, 1 Paige, 244; Baldwin *v.* Salter, 8 Paige, 473 (*semble*); Viele *v.* Troy Co., 21 Barb. 381; Wilson *v.* Tappan, 6 Oh. 172;

Do then any such circumstances exist in this case, analogous to those to which I have already referred, as raising the presumption

Tiernan *v.* Roland, 15 Pa. 429; Townsend *v.* Lewis, 35 Pa. 125; Hun *v.* Bourdon, 57 N. Y. Ap. Div. 351; Osborne *v.* Brewer, 1 Dess. 486; Wightman *v.* Reside, 2 Dess. 578; Frost *v.* Brungon, 6 Yerg. 36; Chadwell *v.* Winston, 3 Tenn. Ch. 110; Mullens *v.* Big Creek Co., (Tenn. 1895) 35 S. W. R. 439; Mays *v.* Swope, 8 Gratt. 46; Daniel *v.* Leitch, 13 Gratt. 195.

The same principle was recognized in the following cases, in which, however, the seller failed because his delay was not excusable: Lloyd *v.* Collett, 4 Bro. C. C. 469; Harrington *v.* Wheeler, 4 Ves. 686; Guest *v.* Homfray, 5 Ves. 818; Parker *v.* Frith, 1 S. & S. 199 n. (b); Heaphy *v.* Hill, 2 S. & S. 29; Watson *v.* Reid, 1 Russ. & My. 236; Venn *v.* Cattell, 27 L. T. Rep. 469; McBryde *v.* Weeks, 22 Beav. 533; Bank of Columbia *v.* Hagner, 1 Pet. 455; McKay *v.* Harrington, 1 McL. 50; Anderson *v.* Frye, 18 Ill. 94; Harding *v.* Olson, 177 Ill. 298; Johnson *v.* Burdett Co., 7 Kan. Ap. 134; Craig *v.* Martin, 3 J. J. Marsh. 50; Taylor *v.* Porter, 1 Dana, 421; Smith *v.* Cansler, 83 Ky. 367; Richmond *v.* Gray, 3 All. 25; Williams *v.* Hart, 116 Mass. 513; Blackwell *v.* Ryan, 21 S. Ca. 112; Jackson *v.* Ligon, 3 Leigh, 161; Christian *v.* Cabell, 22 Gratt. 82; Rison *v.* Newberry, 90 Va. 513; Hogan *v.* Kyle, 7 Wash. 595.

Specific performance required of seller notwithstanding delay of buyer. — In the following cases, in which the parties did not expressly make time of the essence, relief was given against the seller although the buyer was not ready to perform at the appointed day: Reynolds *v.* Nelson, 6 Madd. 18; Taylor *v.* Longworth, 14 Pet. 172; Secombe *v.* Steele, 20 How. 94; Ahl *v.* Johnson, 20 How. 511; Brown *v.* Guarantee Co., 128 U. S. 403; McCabe *v.* Matthews, 155 U. S. 550; Mason *v.* Wallace, 3 McL. 198; Dewey *v.* Whitney, 93 Fed. R. 533, 547; Love *v.* Butler, (Ala. 1901) 30 So. R. 735, 737 (*semble*); Robertson *v.* Read, 52 Ark. 381; Farley *v.* Vaughan, 11 Cal. 227; Barsolon *v.* Newton, 63 Cal. 223; Byers *v.* Denver Co., 13 Colo. 552; Quinn *v.* Roath, 37 Conn. 16; Pritchard *v.* Todd, 38 Conn. 16; Dukes *v.* Baugh, 71 Ga. 33; Hanna *v.* Ratekin, 43 Ill. 462; Linton *v.* Potts, 5 Blackf. 396; Keller *v.* Fisher, 7 Ind. 718; Stretch *v.* Schenck, 23 Ind. 77; Bennett *v.* Welch, 25 Ind. 140; Young *v.* Daniels, 3 Iowa, 126; Presser *v.* Hildenbrand, 23 Iowa, 483; Brown *v.* Ward, 110 Iowa, 123; Kercheval *v.* Swope, 6 Mon. 362; Tyler *v.* Ontzs, 93 Ky. 331; Getchell *v.* Jewett, 4 Me. 350; Linscott *v.* Buck, 33 Me. 530; Bomier *v.* Caldwell, 8 Mich. 463; Converse *v.* Blumreich, 14 Mich. 109; Munro *v.* Edwards, 86 Mich. 91; Austin *v.* Wacks, 30 Minn. 335; Jones *v.* Loggins, 37 Miss. 546; Kellogg *v.* Lavender, 9 Neb. 418; Langan *v.* Thummel, 24 Neb. 265; Pennock *v.* Ela, 41 N. H. 189, 191 (*semble*); New Barbadoes Co. *v.* Vreeland, 4 N. J. Eq. 157; Huffman *v.* Hummer, 17 N. J. Eq. 263 (*semble*); King *v.* Ruckman, 21 N. J. Eq. 599 (reversing s. c. 20 N. J. Eq. 346); Dynan *v.* McCulloch, 46 N. J. Eq. 11; Waters *v.* Travis, 9 Johns. 450; Leaird *v.* Smith, 44 N. Y. 618; Hubbell *v.* Van Schoering, 49 N. Y. 326; Day *v.* Hunt, 112 N. Y. 191; Van Campen *v.* Knight, 63 Barb. 205; Falls *v.* Carpenter, 1 Dev. & B. Eq. 237; Scarlett *v.* Hunter, 3 Jones, Eq. 84; Taylor *v.* Kelly, 3 Jones, Eq. 240, 244 (*semble*); Gibbs *v.* Champion, 3 Oh. 335; Brock *v.* Hidy, 13 Oh. St. 306; Knott *v.* Stephens, 5 Oreg. 235; McLaughlin *v.* Shields, 12 Pa. 283; Remington *v.* Irwin, 14 Pa. 143; Sylvester *v.* Born, 132 Pa. 467; White *v.* Patterson, 139 Pa. 429; Greaves *v.* Gamble, 1 Leg. Gaz. R. 1; Craig *v.* Leiper, 2 Yerg. 193; Walker *v.* Emerson, 20 Tex. 706; Farris *v.* Bennett, 26 Tex. 568; Smith *v.* Profitt, 82 Va. 832; Durand *v.* Sage, 11 Wis. 151.

The same principle was recognized in the following cases, in which, however, the buyer's laches was deemed fatal: Mackreth *v.* Marlar, 1 Cox, 259; Newman *v.* Rogers, 4 Bro. C. C. 391; Spurrier *v.* Hancock, 4 Ves. 667; Hayes *v.* Caryll, 1 Bro. P. C. (Toml. ed.) 126, 5 Vin. Ab. 538, pl. 18 s. c.; Carter *v.* Dean, 7 Sim. 211; Walker *v.* Jeffreys, 1 Hare, 341; Firth *v.* Greenwood, 1 Jur. N. S. 866; Moore *v.* Blake, 1 Ba. & Be. 62; Levy *v.* Stogdon, 1899, 1 Ch. 5; Wallace *v.* Hesslein, 29 Can. S. C. 171; Brashier *v.* Gratz, 6 Wheat. 528; Stewart *v.* Allen, 47 Fed. R. 399; Gentry *v.* Rogers, 40 Ala. 442; Green *v.* Covillaud, 10 Cal. 317; Henderson *v.* Hicks, 58 Cal. 364; Knox *v.* Spratt, 23 Fla. 64 (*semble*); Hough *v.* Coughlan, 41 Ill. 130; Hoyt *v.* Tuxbury, 70 Ill. 331; Alexander *v.* Hoffman, 70 Ill. 114; McLawrie *v.* Barnes, 72 Ill. 73; Iglehart *v.* Vail, 73 Ill. 63; Hedenberg *v.* Jones, 73 Ill. 149; Fitch *v.* Willard, 73 Ill. 92; Roby *v.* Cossitt, 78 Ill. 638; Mix *v.* Baldric, 78 Ill. 215 (*semble* — waiver of delay); Marshall *v.* Perry, 90 Ill. 289; Wolfe *v.* Bradbury, 140 Ill. 578; Hatch *v.* Kizer, 140 Ill. 583; Morse *v.* Seibold, 147 Ill. 318; Brown *v.* Ward, 110 Iowa, 123; Williams *v.* Staake, 2 B. Mon. 196; Logan *v.* Bull, 78 Ky. 607; Rogers *v.* Saunders, 16 Me. 92; Ely *v.* Mackay, 12 All. 323; Cook *v.* Stafford, 86 Mich. 163; Northrup *v.* Stevens, 39 Minn. 105; Holingren *v.* Piete, 50 Minn. 27; Wolf *v.* Great Falls Co., 15 Mont. 49; Eastman *v.* Plumer, 46 N. H. 464; Earl *v.* Halsey, 14 N. J. Eq. 332; Eyre *v.* Eyre, 19 N. J. Eq. 102; Johns *v.*

that time was an essential part of the contract? I find none. The property is not of a perishable nature, the interest in it sold is not of a determinable character, and possession is not required for any purpose of trade or manufacture. I have therefore, on the first question, come to the conclusion that time was not originally of the essence of this contract.

Having come to this conclusion on the first question, it may be superfluous to express my opinion on the next subordinate point, which would have arisen had I come to an opposite conclusion; but as it may have some bearing on the subsequent part of this case, I think it desirable to do so. I am of opinion then, that if time had been originally of the essence of this contract, the defendant has waived that part of it. The time mentioned in the contract for the completion of the purchase is the 25th of October, 1850, but the defendant, by his solicitor, on the 21st of October, 1850, extends that time till the 5th of November, 1850. If time was of the essence of the contract, the contract was at an end, if the title had not been made out on or before the 25th of October, 1850, but after that letter, the defendant would, beyond all question, have been compellable in equity to complete the purchase, if the title had been completed by the 1st November, 1850, or any other day before the 5th November, 1850. It appears to me, therefore, that, after writing this letter, the defendant abandoned his right to insist on the completion of the title on the 25th of October, 1850, which was the day specified in the contract.[1]

Norris, 22 N. J. Eq. 102; Johnson *v.* Somerville, 33 N. J. Eq. 152; Finch *v.* Parker, 49 N. Y. 1; Delevan *v.* Duncan, 49 N. Y. 485; McCotter *v.* Lawrence, 4 Hun, 107, 6 Th. & C. 392 s. c.; Huntington *v.* Titus, 50 N. Y. Ap. Div. 468; Tate *v.* Conner, 2 Dev. Eq. 224; McGalliard *v.* Aikin, 2 Ired. Eq. 186; Love *v.* Welch, 97 N. Ca. 200; Holden *v.* Purefoy, 108 N. Ca. 163; Rummington *v.* Israel, 7 Oh. 383; Higby *v.* Whittaker, 8 Oh. 198; Scott *v.* Barber, 14 Oh. 547; Kirby *v.* Harrison, 2 Oh. St. 326; Campbell *v.* Hicks, 19 Oh. St. 433; Du Bois *v.* Baum, 46 Pa. 537; Miller *v.* Henlan, 51 Pa. 265; Smith *v.* Christmas, 7 Yerg. 565; Eppinger *v.* McGreal, 31 Tex. 147; Anthony *v.* Leftwich, 3 Rand. 238; Williams *v.* Williams, 50 Wis. 311.

In the case last cited RYAN, C. J., said: "This has been called a bill to redeem. In one sense it may partake of the nature of such a bill. Bills by the vendee for specific performance of contracts for the sale and purchase of land may often be regarded, in one aspect, as *quasi* bills to redeem. Such contracts have always been regarded in equity as analogous to equitable mortgages; the vendor standing as mortgagee in fee, and the vendee as owner of the equity of redemption. Button *v.* Schroyer, 5 Wis. 598; Northrup *v.* Trask, 39 Wis. 515. And so a bill for specific performance of such a contract may partake of the nature of a bill to redeem. But it is none the less, in form and scope, strictly a bill for specific performance. As such it is always classed and considered. There is no redemption on such a contract, except by specific performance. Specific performance enforces a contract by giving a party something to which he had not title before. Redemption gives a party nothing new, but enforces his right to repurchase his own, incumbered for a debt. Redemption restores the parties to their former rights of property. Specific performance gives them new rights of property. This is not a distinction without a meaning. In case of incumbrance the debt is the principal thing, and the creditor is bound to receive his debt and release the property. No circumstances can control this right of the debtor. Redemption is therefore *strictissimi juris*. Upon a contract for sale and purchase the land is the principal thing, and the vendor may be excused from receiving the price and conveying the property. Circumstances control the right of specific performance. It is therefore discretionary." — ED.

[1] The conduct of the buyer was equivalent to a waiver of strict performance in the following cases: Seton *v.* Slade, 7 Ves. 264, 276 (*semble*); Levy *v.* Lindo, 3 Mer. 81, 84 (*semble*);

The next question I have to consider is, whether the notice contained in the letter of the 21st of October, 1850, specifying the 5th of November, 1850, as the time for the completion of the contract, made that time an essential part of the contract; or rather, whether it bound the plaintiffs to complete within that period of time or to abandon the contract. It is, I consider, the undoubted law of this court, that although time was not originally an essential part of the contract, still that either party may, by a proper notice, bind the other to complete within a reasonable time to be specified in such notice; and if the party receiving such notice do not complete within the time so specified, equity will not enforce a specific performance of the contract, but leave the parties to their remedies and their liabilities at law.[1] The doctrine on this subject is, I think, well laid down in Walker *v.* Jeffreys,[2] and Southcomb *v.* Bishop of Exeter,[3] by Sir James Wigram.[4]

But although the notice was not sufficient, then the next question arises, the plaintiffs may have acquiesced in it, or they may, by *laches*, have waived their right to seek for any relief from this court. Heaphy *v.* Hill and Watson *v.* Reid establishes this proposition, which I apprehend to be the settled law of the court, viz., that if one of two parties to a contract for the sale of land give to the other notice that he will not perform the contract, and the person receiving the notice does not, within a reasonable time after the receipt of such notice, take steps to enforce the contract, equity will consider him to have acquiesced in the abandonment of the contract, and will leave the parties to it to their remedies at law;[5] and the tendency of modern

Hipwell *v.* Knight, 1 Y. & C. Ex. 401. The conduct of the seller amounted to a waiver in Hudson *v.* Bartram, 3 Madd. 440 (but see Pincke *v.* Curtis, 4 Bro. C. C. 332; Brassell *v.* McLemore, 50 Ala. 476).

[1] The right of the buyer to notify the seller to perform within a reasonable time, with the result that the seller's failure to perform within that time will terminate the buyer's liability, was recognized in the following cases: Taylor *v.* Brown, 2 Beav. 180, 183; King *v.* Wilson, 6 Beav. 124 (*semble* — one week too short); Benson *v.* Lamb, 9 Beav. 502 (10 days); Southcombe *v.* Bishop, 6 Hare, 213 (2 months); Nokes *v.* Kilmorey, 1 De G. & Sm. 444 (6 months); Macbryde *v.* Weekes, 22 Beav. 533 (1 month); Nott *v.* Ricard, 22 Beav. 307; Wells *v.* Maxwell, 32 Beav. 408, affirmed 33 L. J. Ch. 44 (*semble* — 1 month too short); Lee *v.* Soames, 36 W. R. 884, 885 (*semble* — 1 week); McMurray *v.* Spicer, 5 Eq. 527 (*semble* — 1 week too short); Webb *v.* Hughes, 10 Eq. 281 (no notice); Harding *v.* Olson, 177 Ill. 298; Schmidt *v.* Reid, 132 N. Y. 108 (3 days); Clarno *v.* Grayson, 30 Oreg. 111, 121.

The right of the seller to serve a similar notice upon the buyer and with the same effect was recognized in Pegg *v.* Wisden, 16 Beav. 239 (*semble* — 6 weeks too short); Crawford *v.* Toogood, 13 Ch. D. 153 (*semble* — 35 days too short); Green *v.* Sevin, 13 Ch. D. 589 (*semble* — 3 weeks too short); Howe *v.* Smith, 27 Ch. D. 89; Henderson *v.* Hicks, 58 Cal. 364; Asia *v.* Hiser, 38 Fla. 71, 80; Chabot *v.* Winter Park Co., 34 Fla. 258 (40 days); Presser *v.* Hildenbrand, 23 Iowa, 483 (*semble*); Fuller *v.* Hovey, 2 All. 324; (see also Thaxter *v.* Sprague, 159 Mass. 397, 398; Myers *v.* De Mier, 52 N. Y. 647; Campbell *v.* Hicks, 19 Oh. St. 433; Knott *v.* Stephens, 5 Oreg. 235, 241. — ED.

[2] 1 Hare, 341.

[3] 6 Hare, 213.

[4] The Master of the Rolls decided, in view of all the circumstances, that the notice was unreasonably short. — ED.

[5] In accordance with this principle the seller forfeited his right to enforce the contract by unreasonable delay after the receipt of the buyer's inadequate notice. Guest *v.* Homfray, 5 Ves. 818; Heaphy *v.* Hill, 2 S. & S. 29; Watson *v.* Reid, 1 Russ. & My. 236; Walker *v.* Jeffreys, 1 Hare, 341; Bank of Columbia *v.* Hagner, 1 Pet. 455; Taylor *v.* Porter, 1 Dana,

decisions has been to diminish the time allowed to either party for enforcing his right under the contract. It remains to apply these principles to the facts of the present case. Even though the time given by the notice of the 21st October, 1850, be not, in my opinion, sufficient, the defendant is entitled to have it treated as an express notice of his abandonment of the contract on the 5th of November, 1850; then the question is, whether the plaintiffs have acquiesced in this notice, or been guilty of such *laches*, as to prevent them from seeking the assistance of a court of equity.

I am convinced that no court, having regard to these decisions on this subject, will hold that under these circumstances the plaintiffs can be said to have forfeited what rights they had in equity, by reason of any implied acquiescence in the notice of the 21st of October, 1850, or by reason of their having been too negligent and dilatory in the enforcement of their claim.

The short result of the opinion that I have come to is: First. That time was not originally of the essence of the contract. Secondly. That although express notice will make time of the essence of the contract, where a reasonable time is specified, that the notice of the 21st October did not specify a reasonable time for this purpose. Thirdly. That although acquiescence in the abandonment of a contract or *laches* in seeking the assistance of a court of equity will bar a party to a contract enforcing his rights, yet that there are not any facts in evidence before me to justify the court in holding that the plaintiffs acquiesced in such abandonment, or that he has been guilty of such *laches* as will prevent this court from enforcing the specific performance of this contract.

The decree pronounced by me will be the common decree for specific performance, with a reference to the Master as to title, unless that be accepted; and as the suit has been rendered necessary by the resistance of the defendant to perform the contract, it follows, as a necessary consequence from my decision, that the defendant must pay the costs of the suit, so far as the same has been incurred by reason of his resisting his liability specifically to perform the contract.[1]

421; Richmond *v.* Gray, 3 All. 25; Jackson *v.* Ligon, 3 Leigh, 161; Combs *v.* Scott, 76 Wis. 662.

In the following cases the buyer forfeited his right to enforce the contract by a similar delay: Spurrier *v.* Hancock, 4 Ves. 667; Walker *v.* Jeffreys, 1 Hare, 341; Alloway *v.* Blaine, 26 Beav. 575; Huxham *v.* Llewellyn, 28 L. T. Rep. 577; Gentry *v.* Rogers, 40 Ala. 442; McDermid *v.* McGregor, 21 Minn. 111; Wolf *v.* Great Falls Co., 15 Mont. 49; Bullock *v.* Adams, 20 N. J. Eq. 367; Rummington *v.* Israel, 7 Oh. 383; Higby *v.* Whittaker, 8 Oh. 198; Kirby *v.* Harrison, 2 Oh. St. 326; Du Bois *v.* Baum, 46 Pa. 537; Miller *v.* Henlan, 51 Pa. 265. — Ed.

[1] Roberts *v.* Berry, 3 D. M. & G. 284 (affirming s. c. 16 Beav. 31) *Accord.* — Ed.

LLOYD *v.* RIPPINGALE.

In Chancery, before Sir Lancelot Shadwell, V. C.

[1 *Younge & Collyer, Exchequer*, 410 (*cited*).]

The plaintiff had contracted to sell a manor in Norfolk to the defendant. It was stipulated, in express words, that time should be of the essence of the contract. The abstract was delivered immediately, and was retained by the purchaser till within two days of the expiration of the time for completing the contract, when it was returned with 80 or 90 objections. The parties then came to an arrangement that the time should be extended, which was accordingly done by a second agreement, containing the same expression as to time as the former. A clause was likewise introduced, that such extension of time should not do away with the right to object that the title was not good. In the end, the purchaser turned round and would not take it, because the title was not made out at the time stipulated for. A bill was then filed for the specific performance of the contract, and it was contended, on the part of the plaintiff, that the purchaser had made an unfair use of the stipulation as to time; but the Vice-Chancellor held that time was of the essence of the contract, and that the stipulation was not waived by the defendant.[1]

[1] Lord Thurlow expressed the opinion in the Williams *v.* Thompson, Newland, Cont. (2d ed.) 238, and in Greyson *v.* Riddle, Newland, Cont. (2d ed.) 239, that time could not be made of the essence of the contract even by express stipulation that a failure of the one party to perform at a particular day should exonerate the other party. But this opinion has often been repudiated. In the following cases, in which time was expressly made of the essence of the contract, the plaintiff not being ready to perform at the day appointed, was not permitted to enforce specific performance by the buyer. Seton *v.* Slade, 7 Ves. 269, 270; Levy *v.* Lindo, 3 Mer. 81, 84; Boehm *v.* Wood, 1 J. & W. 419; Withy *v.* Cottle, T. & R. 78; Hipwell *v.* Knight, 1 Y. & C. Ex. 401; Roberts *v.* Berry, 3 D. M. & G. 284 (affirming s. c. 16 Beav. 31); Cleary *v.* Folger, 84 Cal. 316; Woodruff *v.* Semi-Tropic Co., 87 Cal. 275; Westerman *v.* Means, 12 Pa. 97.

Similarly, in the following cases, the buyer forfeited all right of specific performance because he was not ready to perform at the appointed time. Hearne *v.* Tenant, 13 Ves. 287 (*semble*); Hudson *v.* Bartram, 3 Madd. 440, 447 (*semble*); Honeyman *v.* Morryat, 21 Beav. 14 (*semble*; Barclay *v.* Messenger, 43 L. J. Ch. 448; Ky Co. *v.* Warwick Co., 109 Fed. R. 280; Grey *v.* Tubbs, 43 Cal. 359; Bennett *v.* Hyde, 92 Cal. 131; Smith *v.* Brown, 10 Ill. 309; Kemp *v.* Humphreys, 13 Ill. 573; Shortall *v.* Mitchell, 57 Ill. 161; Evert *v.* Arends, 190 Ill. 221 (*semble*); Davis *v.* Stevens, 3 Iowa, 158; Carter *v.* Walters, 91 Iowa, 727; Auxier *v.* Taylor, 102 Iowa, 673; Mo. Co. *v.* Brickley, 21 Kan. 275; Goldsmith *v.* Guild, 10 All. 239; O'Fallon *v.* Kennerly, 45 Mo. 124; Glass *v.* Lowe, 103 Mo. 513 (*semble*); Morgan *v.* Burgen, 3 Neb. 209; Wells *v.* Smith, 7 Paige, 22; Brewer *v.* State, 9 Oh. 189; Reed *v.* Breeden, 61 Pa. 460; Axford *v.* Thomas, 160 Pa. 8; Doar *v.* Gibbs, Bail. Eq. 371.

Waiver of strict performance. — Thayer *v.* Star Co., 105 Ill. 540; Watson *v.* White, 152 Ill. 364; McWhirter *v.* Crawford, 104 Iowa, 550.

Waiver of seller's option to declare a forfeiture. — If by the terms of the contract a breach of the buyer's contract does not *ipso facto* forfeit his rights, but merely gives an option to the seller to declare a forfeiture, the seller must exercise his option promptly. The benefit of the option was lost by delay in Gaughen *v.* Kerr, 99 Iowa, 214 (more than 1 year); Fargusson *v.* Talcott, 7 N. Dak. 183 (3 months); Pier *v.* Lee, (S. Dakota, 1901) 86 N. W. 642 (3 months); Hall *v.* De la Plaine, 5 Wis. 206 (*semble*).

But see, *contra*, Mo. Co. *v.* Brickley, 21 Kan. 275, 294. — Ed.

TILLEY *v.* THOMAS.

IN CHANCERY, BEFORE LORD CAIRNS AND SIR JOHN ROLT, L. JJ., NOVEMBER 11, 1867.

[*Law Reports*, 3 *Chancery Appeals*, 61.]

THIS was an appeal from a decision of Vice-Chancellor Stuart.

The plaintiff sought specific performance of the defendant's agreement, which was in the following terms: —

"LONDON, 14th *December*, 1864.

"I hereby agree to purchase the lease of Cambridge Lodge, North End, Fulham, for the sum of £700, to include house, fixtures and fittings of outbuildings adjoining thereto, and garden stock in ground. Possession to be given on the 14th January next."

On the 23d of December the plaintiff delivered an abstract of his title, but difficulties arose in the production of the lessor's title, which were not cleared up before the 14th of January, 1865. On that day the plaintiff offered to deliver up possession of the house and premises to the defendant, but he refused to accept possession on the ground that the plaintiff had not shown a complete title. On the 5th of June, 1865, the plaintiff filed his bill for specific performance of the contract, alleging that he had, since the 14th of January, deduced a good title to the premises.

At the time of making the agreement the plaintiff was informed that the defendant had arranged to sell the house in which he then resided and to move out within a very short period, and that he wished to have possession of the house and grounds of Cambridge Lodge by the 14th day of January, 1865, in order that he might make any alterations which he might think desirable in the grounds and gardens, and that he might furnish the house.[1]

LORD CAIRNS, L. J. So far as the construction of the memorandum is concerned, there cannot, I think, be any doubt that the words "possession to be given on the 14th of January next," point to and intend, not a possession on sufferance, or with the risk of eviction, but a possession to be delivered to the purchaser, as proprietor, in exchange for the price, and as Lord Eldon, in Boehm *v.* Wood,[2] puts it, after such a previous manifestation of title as would show that the possession could be safely taken. A contract may indeed be, and sometimes is, so framed as to show, by the contrast drawn between possession and the completion of the purchase, that the former possession is intended to be provisional and irrespective of title. It was argued that the words in the receipt given by the vendor for the deposit, "to be returned in event of the sale not being completed through the vendor's

[1] The statement is condensed, and the arguments of counsel as well as the concurring judgment of Rolt, L. J., are omitted. — ED.

[2] 1 Jac. & W. 420.

fault," were in this case used in contrast to "possession" in the contract. The receipt was, however, given after the contract was written and signed, and I read the words "completed" in the receipt as referring to the period already mentioned for possession in the contract, namely, the 14th of January, 1865, otherwise, there would be a stipulation for the return of the deposit, depending on delay in completing the purchase, without any time by which delay might be tested, except the period of reasonable time which the law would imply — a test for such a purpose eminently vague and unsatisfactory.

The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be, in equity the same as in a court of law. A court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice Turner said in Roberts *v.* Berry),[1] there is nothing in the "express stipulations between the parties, the nature of the property, or the surrounding circumstances," which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract.

Of the three grounds against interference mentioned by Lord Justice Turner, "express stipulations" requires no comment. The "nature of the property" is illustrated by the case of reversions, mines, or trades. The "surrounding circumstances" must depend on the facts of each particular case.

In this case the property sold was a residential leasehold house, not apparently let or producing rent at the time of sale, and intended by the defendant to be used as his own residence. [His Lordship then referred to the statements in the defendant's answer, and in the affidavit of the plaintiff, and continued: —]

Looking to the admitted facts thus stated, I can have no hesitation in saying that in my opinion it was essential, and known to both parties to be essential, that the defendant should have, by the time stipulated, possession of the house for repairs and improvements with a view to his own immediate residence, a possession, therefore, which could not be disturbed — a possession, that is to say, with a title, and that to enforce against the purchaser performance of the contract after a breach of it by the vendor in this respect would be inequitable.

The abstract was delivered two days before Christmas Day, 1864. An appointment to examine the deeds was forthwith made by the defendant's solicitor for the 27th, and the statement in the answer as to what then occurred is not contradicted.

There was, therefore, no delay or waiver on the part of the defendant in asserting and maintaining his rights. It appears that during all this time the vendor could not make a good title, irrespective of the question of his landlord's title to the house; for there was a mort-

[1] 3 D. M. & G. 284.

gage irredeemable before 1868, with powers of sale and distress in the mortgage.

I think the defendant was, under the circumstances, entitled on the 14th of January to refuse to perform the contract. Some subsequent negotiation took place as to making out the lessor's title, but it was after this refusal had been distinctly made, and it was expressly without prejudice to the defendant's right so asserted.

The decree appealed from will therefore be discharged, and the plaintiff's bill dismissed with costs.[1]

VERNON *v.* STEPHENS.

In Chancery, before Lord Macclesfield, C., Trinity Term, 1722.

[2 *Peere Williams*, 66.]

The plaintiff brought this bill for a specific performance of articles entered into by the defendant's father Stephens, to the plaintiff, for sale of the manor of Wheelock in Cheshire for 1200*l.* and 100 guineas.

There had arose some difficulty about the title, and the plaintiff insisting that the same was not good without an act of parliament, the defendant's father procured an act of parliament; upon which the plaintiff paid part of the money, but making default in payment of the residue, the defendant's father brought a bill to have the residue of the money, or to be discharged of the articles.

Just before that bill was ready for hearing, the plaintiff and defendant's father entered into an order by consent, signed by both parties, and reciting the articles, by which the plaintiff agreed to pay the money by such a day, or in default thereof the articles to be delivered up and cancelled, and the defendant's father to hold the premises discharged of the articles.

Then the plaintiff paid 1000*l.* in part, but made default in payment

[1] By reason of the "nature of the property or the surrounding circumstances" a slight delay was fatal to the seller's claim for specific performance in the following cases: Lewis *v.* Lechmere, 10 Mod. 503 (*semble* — South Sea stock); Seaton *v.* Mapp, 2 Coll. 556 (public house as a going concern); Nokes *v.* Kilmorey, 1 DeG. & Sm. 444 (land desired for immediate building); Day *v.* Luhke, 5 Eq. 336 (public house); Clayton *v.* Green, L. R. 3 C. P. 511 (public house); Cowles *v.* Gale, 7 Ch. 12 (public house); Glasbrook *v.* Richardson, 23 W. R. 51 (trade property); Huxham *v.* Llewellyn, 28 L. T. Rep. 577 (coal mines); Patrick *v.* Milner, 2 C. P. D. 342, 348 (*semble* — reversionary interest in stock); Weston *v.* Savage, 10 Ch. D. 736, 741 (*semble* — public house); Waterman *v.* Banks, 144 U. S. 394, 403 (mining property); Myers *v.* League, 62 Fed. R. 654 (lands fluctuating greatly in value); Ky. Co. *v.* Warwick Co., 109 Fed. R. 280 (property fluctuating in value); Hawley *v.* Jelly, 25 Mich. 94 (property likely to advance greatly because of expected public improvement); King *v.* Ruckman, 20 N. J. Eq. 316 (fluctuating property).

For the same reason the buyer was unsuccessful in the following cases: Doloret *v.* Rothschild, 1 S. & S. 590 (government stock); Coslake *v.* Till, 1 Russ. 376 (public house); Payne *v.* Banner, 15 L. J. Ch. 227 (patent — payment required to protect it); Goldsmith *v.* Guild, 10 All. 239 (land in war-time, when gold fluctuated greatly). — Ed.

of the residue, and entered into another order by consent signed by both parties, whereby a further day was given, when if the money was not paid, the plaintiff agreed to lose all the money which he had advanced before, and to lose the benefit of the articles, which were to be put into the hands of Mr. Cox the counsel, and delivered over to the defendant's father in default of payment, and in case of such default the defendant's father to hold the premises discharged of the articles.

The plaintiff Vernon, having again made default, now brought this bill to have the purchase completed, on payment of what was due, with interest, and to be relieved against these orders.

Lord Chancellor: Here have been solemn agreements that ought not slightly to be got over; but, however, if the defendant has his money, interest and costs, he will have no reason to complain of having suffered; on the contrary, it would be a very great hardship on the plaintiff to lose all the money which he has paid; lapse of time in payment may be recompensed with interest and costs; and as to these agreements, they were all intended only as a security for payment of the money, which end is answered by the payment of principal, interest, and costs.

In 1720, when the money was to have been paid, there was a great scarcity of money, they in whose hands it was, locking it up; also, at that time, the defendant's father was dead, which was the act of God, and his executors not acting, it was some time before the defendant took out administration with the will annexed of his father, which was the default of the party; so that the plaintiff's payment of the money at the exact time was dispensed with.

Let the plaintiff be relieved upon payment of principal, interest, and costs.[1]

[1] Notwithstanding a stipulation that the buyer should forfeit all right to enforce the contract and also all payments, in case of non-compliance with the agreement, the court declined to enforce the forfeiture in *Re* Dagenham Co., 8 Ch. 1022; Cornewall *v.* Hanson, 1900, 2 Ch. 298, 304; Cheney *v.* Libby, 134 U. S. 68 (*semble*); Mialhi *v.* Lassabe, 4 Ala. 712, 714 (*semble*); Dukes *v.* Baugh, 91 Ga. 33 (*semble*); Jones *v.* Robbins, 29 Me. 351; Barnard *v.* Lee, 97 Mass. 92; Richmond *v.* Robinson, 12 Mich. 193; Ewing *v.* Gordon, 49 N. H. 444; Grigg *v.* Landis, 21 N. J. Eq. 494; Wells *v.* Smith, 7 Paige, 22, 24 (*semble*); Edgerton v. Peckham, 11 Paige, 352 (explaining Benedict *v.* Lynch, 1 Johns. Ch. 370); Fargusson *v.* Tallcott, 7 N. Dak. 183 (*semble*); De Camp *v.* Feay, 5 S. & R. 323; Hall *v.* De la Plaine, 5 Wis. 206 (*semble*) *Accord.*

But if by the terms of the bargain the buyer is to forfeit what he has paid "as a deposit," in case of his failure duly to perform on his part, the seller may keep the deposit, such deposit being regarded as a reasonable guarantee that the buyer means business, which on grounds of policy is properly forfeited by the buyer's default. Howe *v.* Smith, 27 Ch. D. 89; Soper *v.* Arnold, 14 App. Cas. 429. — Ed.

NATHANIEL HECKARD *v.* EDWARD SAYRE.

SUPREME COURT, ILLINOIS, APRIL TERM, 1874.

[34 *Illinois Reports*, 142.]

MR. JUSTICE BECKWITH[1] delivered the opinion of the court.

This is a suit in equity to enforce the specific performance of a contract for the sale of a tract of land in Fulton County.

On the 18th of September, 1857, the plaintiff in error bargained with the defendant in error, to sell him the land for the sum of $900. One hundred and five $\frac{80}{100}$ dollars were then paid, and two notes were given for the residue; one for $494 $\frac{11}{100}$ payable on or before October 25, 1857, and the other for $300, payable on or before September 1, 1858.

The contract between the parties provided, that the above notes should be paid at maturity; that the time stipulated for their payment should be regarded as of the essence of the contract; and that the non-payment of either of the notes when they should become due should be considered as an avoidance of the vendor's obligation, and as an absolute forfeiture of all payments previously made. The note maturing first was paid at maturity, and a tender of the amount due upon the other note was made on the 7th day of September, 1858, six days after it fell due.

The bill alleges a waiver by the vendor of the prompt performance of the agreement; and sets up as an excuse for the vendee's neglect to make the last payment at the time required that he was engaged in the discharge of his official duties as clerk of the circuit court of Fulton County.

There is no evidence of any waiver by the vendor of the stipulation in regard to time, and we think the excuse alleged is entirely insufficient. The term of the court at which the defendant in error was required to attend commenced on the 6th day of July, 1858, and he might have employed some one to transact his business with the plaintiff in error, if it was not convenient to attend to it in person. Such an excuse, if allowed, would exempt the clerks of many courts in this State from ever discharging their obligations.

From the allegations of the bill it appears that the complainant did not have the money to make the last payment at the time it became due; and stipulations like the one in the contract under consideration would be of little value if they were to be enforced only in cases where parties making them had the money with which they might be discharged. No rule is more firmly settled than that parties may make time of the essence of a contract. In this case the parties have so made it, in plain and unambiguous language.

At law the defendant in error has no remedy for a breach of the

[1] Only the opinion of the court is given. — ED.

agreement by reason of his own non-performance. He was not hindered or prevented in the discharge of his obligations by any fraud, accident, or mistake; and under such circumstances equity must follow the law. A court of equity has no more right than a court of law to dispense with an express stipulation of parties in regard to time, in contracts of this nature, where no fraud, accident, or mistake has intervened. To relieve from the effect of such stipulations, except on the grounds named, would practically deny the right of parties to make them. Such relief would result in great injustice to vendors. Usually the price of lands in this country is fixed with reference to prompt payment; and where they are an article of commerce, it is often of the last importance to a vendor to receive his money promptly. We have all known men of affluence reduced to penury by neglect in making such payments as they became due. A vendor may require the payments to be made promptly to enable him to meet his own engagements; and for that purpose a stipulation may be inserted in the contract that time shall be of its essence. If courts were to allow a vendee to neglect to make his payments at the stipulated times, where he is not hindered or prevented from so doing by fraud, accident, or mistake, the consequences of his negligence would be visited upon his vendor. Justice does not require relief from the result of one's own negligence. Courts of equity in such cases refuse to interfere; and leave the parties to their remedies at law, if any they have, for the reason that there is no equity requiring such an interposition.

It was urged in argument that the plaintiff in error might compel the payment of the note of the defendant in error, but if he should do so an equitable right to a conveyance of the land would then exist which, upon proper application, would be enforced. Equity would not allow the plaintiff in error to collect the residue of the purchase money and hold the land, but until he attempts its collection no such equity arises.

The decree of the court below is reversed, and the cause remanded.

Decree reversed.[1]

[1] Glock *v.* Howard Co., 123 Cal. 1 (explaining Drew *v.* Pellar, 87 Cal. 443. But see Steele *v.* Branch, 40 Cal. 11; Miller *v.* Cox, 96 Cal. 339, 347); Chrisman *v.* Miller, 21 Ill. 227 (one third purchase money paid — delay of two years); Steele *v.* Briggs, 22 Ill. 643 (buyer in possession, one half purchase money paid, improvements made — delay of two months); Stow *v.* Russell, 36 Ill. 18 (*semble* — one half purchase money paid); Phelps *v.* Ill. Co., 63 Ill. 468 (part payment — delay of five years); Kimball *v.* Tooke, 70 Ill. 553 ($100 deposit paid on $30,000 purchase — delay of three and a half years); Erving *v.* Crouse, 6 Ind. 312 ($100 deposit on $4000 purchase — delay of five days in tendering first instalment of $900); Prince *v.* Griffin, 27 Iowa, 514 (three fifths purchase money paid, improvements made — delay of seven years); Iowa Co. *v.* Mickel, 41 Iowa, 402 (one fourth purchase money paid, $4000 of improvements, second instalment five days late); Miller *v.* Hughes, 95 Iowa, 223 ($375 paid, improvements made — delay of 33 days); Fort *v.* Bush, 100 Iowa, 522 ($20 paid on $120 purchase, improvements made — delay of one year); Judd *v.* Skidmore, 33 Minn. 140 ($400 paid on $9500 purchase — short delay. See Coles *v.* Shepard, 30 Minn. 446, 449); Morgan *v.* Bergh, 3 Neb. 209 (*semble* — two ninths purchase money paid — delay of three years); Patterson *v.* Murphy, 41 Neb. 818 (nearly one half purchase money paid — delay of eight months); Brown *v.* Ulrich, 48 Neb. 409 (part payment, improvements — short delay. Merriam *v.* Goodett, 36 Neb. 384, overruled); Whitman *v.* Perkins, 56 Neb. 181

RUTHERFORD *v.* HAVEN & CO.

SUPREME COURT, IOWA, APRIL 23, 1861.

[11 *Iowa Reports*, 587.]

WRIGHT, J. The leading question in this case is, whether in equity the vendor of real estate who seeks a performance and foreclosure of a contract containing mutual and dependent covenants is required, as at law, to tender a deed to the vendee before filing his bill. None of the cases cited by appellees sustain the affirmative of this proposition. They were all actions at law, except that of Barron *v.* Easton *et al.*,[1] and what is said in that case may be well understood as applying to an action at law for the purchase money. And in our opinion the reason for the rules in a law action, does not apply in a court of equity. At law, if the vendor recovers his judgment for the purchase money, it must necessarily, from the nature of the tribunal, be unconditional or without terms. In equity the chancellor has full power to protect the vendee, and to make the execution and deposit of the deed with the clerk or other person to be named, a condition precedent to the enforcement of the decree.

This view is in principle sustained in the reasoning used in Young *v.* Daniels,[2] and we deem it just and equitable. And especially is this so in view of the fact that the chancellor is justified in awarding any costs against the complainant, which it shall appear might have been avoided by a prior offer to perform on his part.

The other points made by the demurrer to the bill are not strongly urged and are not of such weight as to require specific attention. None of them impress us as being well made.

Decree reversed.[3]

(improvements made — delay of ten months, eight of the ten months being after seller declared a forfeiture); Maloy *v.* Muir, 60 Neb. 173 (part payment of purchase money, improvements — delay of more than a year); Snider *v.* Lehnherr, 5 Oreg. 385 (*semble* — seller returned the money paid) *Accord.*

Hansbrough *v.* Peck, 5 Wall. 497, is sometimes cited as involving the same doctrine as that of the principal case. But there is a clear distinction between them. In Hansbrough *v.* Peck the seller brought a bill in equity to foreclose the buyer's right to specific performance unless he paid within a fixed time. After a decree in the seller's favor, the buyer was not permitted to recover his partial payments of purchase money.

Waiver of forfeiture. — The seller's right to refuse to convey, and at the same time to retain the benefit of payments and improvements by the buyer, may be waived either by words or conduct. Cheney *v.* Libby, 134 U. S. 68; Coughran *v.* Bigelow, 164 U. S. 301, 310; Shouse *v.* Doane, 39 Fla. 95; Struble *v.* Allin, 110 Iowa, 101; Dane *v.* St. Paul Co., 42 Minn. 194, 195 (*semble*); Paulman *v.* Cheney, 18 Neb. 392; Ewing *v.* Gordon, 49 N. H. 444; Grigg *v.* Landis, 21 N. J. Eq. 494; Thompson *v.* Keeler (N. J. Eq. 1899), 42 Atl. R. 1043.

No right of forfeiture if seller cannot give a good title. — Wallace *v.* McLaughlin, 57 Ill. 53; Snyder *v.* Spaulding, 57 Ill. 480; Peck *v.* Brighton Co., 69 Ill. 200.

[1] 3 Iowa, 76. [2] 2 Iowa, 135.

[3] The failure of the seller, who has a good title, to tender a conveyance, or of a buyer to tender the purchase money before bill filed, will not prejudice the plaintiff beyond the payment of costs. Ashurst *v.* Peck, 101 Ala. 499; Boston *v* Nichols, 47 Ill. 353; Watson *v.*

TALMASH *v.* MUGLESTON.

In Chancery, before Sir John Leach, V. C., May 31, 1826.

[4 *Law Journal, Chancery*, 200.]

The bill was filed for the specific performance of an agreement, dated in 1806, by which the defendants agreed to sell certain premises to the plaintiff; £100 had been paid as deposit. Great mutual delays had taken place; and the bill stated a correspondence between the solicitors of the parties, which continued at intervals throughout several years. The last letter was dated in 1815, and was written on the subject of the title by the solicitor of the plaintiff to the solicitor for the defendants. The bill averred that the contract had not been rescinded or abandoned. To this bill the defendants pleaded the statute of limitations (21 James I.), the plea averring that the said bill was filed on the 15th day of October, 1825.

Mr. Koe appeared in support of the plea.

The contract was made nearly twenty years ago; and the last transaction mentioned in the bill precedes the institution of the suit by much more than six years. If the plaintiff brought an action of damages for non-performance of the contract, the statute would be a bar to him; and, by analogy, it will be a defence to a suit in equity. It is not the practice of the court to decree a specific performance, if the party has lain by for more than six years.

He cited Lloyd *v.* Collett,[1] Harrington *v.* Wheeler,[2] Marquis of Hertford *v.* Boore,[3] Alley *v.* Deschamps,[4] Moore *v.* Blake.[5]

Mr. Shadwell, contra. The plea of the statute of limitations cannot by itself be a good plea; it must always be supported by averments bringing the case within the statute. In this plea there is nothing which meets the allegation in the bill, that the contract has never been abandoned or rescinded.

The only averment in it is that the bill was filed on a certain day.

Vice-Chancellor. It was not necessary to plead on what day the bill was filed; that is apparent on the record. But what has the

White, 152 Ill. 364; Laverty *v.* Hall, 19 Iowa, 526; Winton *v.* Sherman, 20 Iowa, 295; Grinnell *v.* Warner, 21 Iowa, 11; Auxier *v.* Taylor, 102 Iowa, 673; Brown *v.* Ward, 110 Iowa, 123; Smoot *v.* Rea, 19 Md. 398, 410; Maughlin *v.* Perry, 35 Md. 352; Irvin *v.* Gregory, 13 Gray, 215; Morris *v.* Hoyt, 11 Mich. 9; Minneapolis Co. *v.* Chisholm, 55 Minn. 374; Brown *v.* Norcross, 59 N. J. Eq. 427; Worch *v.* Woodruff, (N. J. Eq. 1900) 47 Atl. R. 725; Melick *v.* Cross, (N. J. Eq. 1901) 51 Atl. R. 16, 23; Stevenson *v.* Maxwell, 2 N. Y. 408, 415; Freeson *v* Bissell, 63 N. Y. 168; Thomson *v.* Smith, 63 N. Y. 301, 304; Bellinger *v.* Kitts, 6 Barb. 273, 281; Shelby *v.* Mikkelson, 5 N. Dak. 22, 28; Brock *v.* Hidy, 13 Oh. St. 306 (*semble*); Hawk *v.* Greensweig, 2 Barr, 295; Chess's Ap., 4 Barr, 52; Mullens *v.* Big Creek Co., (Tenn. 1895) 35 S. W. R. 438; Seeley *v.* Howard, 13 Wis. 336 (*semble*).

But see *contra* O'Kane *v.* Kiser, 25 Ind. 168 (*semble*); Mather *v.* Scoles, 35 Ind. 1; Klyce *v.* Brayles, 37 Miss. 524; Mhoon *v.* Wilkerson, 47 Miss. 633; Hall *v.* Whittier, 10 R. I. 530 (*semble*). — Ed.

[1] 4 Bro. C. C. 469. [2] 4 Vesey, jun., 686. [3] 5 Vesey, jun., 720, in the note.
[4] 13 Vesey, 225. [5] 1 Ball & Beattie, 62.

statute of limitations to do with the specific performance of a contract? The rule of this court, which refuses to enforce the specific performance of a contract after a certain interval, does not result from the statute of limitations. Suppose the rule to be adopted by analogy to the statute, that would not enable the defendant to plead the statute.

The statute of limitations never can be made available in any court, unless pleaded; for a party may abandon the protection which it throws round him. But this court, like every other, is bound to take notice of every public statute for the purposes of analogy, and of the statute of limitations among the rest. Where a court of equity proceeds by analogy to the statute, it is bound to know the statute, in order to apply the analogy. It is not necessary, therefore, to plead the statute; nor can the rule of the court, and the analogy on which it is founded, enable the party to protect himself by such a plea. If the case stated in the bill is of such a kind, that the court, according to its known rules, will refuse to decree specific performance, the defendant ought to demur. It can serve no end for him to put in a plea, which only states an act of Parliament, to which the court, in applying its rules by analogy to that statute, would be bound to advert. It is impossible that the statute can be a bar to a species of suit to which it has no reference.

If the case appears sufficiently on the bill to lay a proper foundation for the application of the principle alluded to in the cases which have been cited, the defendant ought to have demurred; and, in support of that demurrer, the argument would have been, that it appears by the plaintiff's own showing, that, if he were to proceed at law, he could not recover damages, and consequently the court, adopting by analogy the legal rule, will refuse to assist him.

If the circumstances did not appear on the bill so as to warrant the application of the rule, it would then be necessary to plead the facts, which were suppressed by the bill, and which were supposed to bring the case within the range of the equitable principle.

Mr. Koe submitted, that, in Hony *v.* Hony,[1] where that which might have been the subject of an action was made matter of complaint in a bill in equity, it was not even attempted to be argued that the plea, though bad for another reason, was bad on the ground now suggested; namely, that the statute of limitations, which would have been a bar at law, would not be a bar also to the equitable relief.

Vice-Chancellor. In that case this court had a concurrent jurisdiction with a court of law; and, consequently, what would be a good plea at law would be a good plea in equity. But the jurisdiction of compelling specific performance is not a concurrent jurisdiction; and a suit for specific performance is within neither the words nor the purview of the statute of limitations. In Hony *v.* Hony, an action might have been sustained for the produce of the timber; but, under the circumstances, this court had a concurrent jurisdiction in the way

[1] S. & S. 568.

of account. If the value of the timber had been sought to be recovered in the shape of damages in an action, the statute of limitations would have been a good plea at law; and, consequently, the same plea would be good here; for a man cannot escape from the statute by coming into a court of concurrent jurisdiction. That has nothing to do with a suit for specific performance.

The plea was overruled.

BRUCE *v.* TILSON.

Court of Appeals, New York, September, 1862.

[25 *New York Reports*, 194.]

Action to compel the conveyance of the exclusive privilege of using, burning, and carrying away stone from quarries on the defendant's farm in pursuance of a contract made January 9, 1838, by which the defendant agreed to sell to one Lawrence "the exclusive privilege of using, burning, and carrying away stone from all the quarries situated on the farm of the said Tilson with three acres of land lying on the canal and extending back to said quarries, for the sum of one thousand dollars, to be secured by bond and mortgage on said premises payable in two years from date with interest payable yearly." On the 19th January, 1838, the defendant and his wife conveyed to Lawrence four and a half acres of land described by metes and bounds, and which was surveyed and laid out by direction of the defendant and under the supervision of both parties, and Lawrence gave his mortgage thereon to secure his bond for one thousand dollars, the purchase money mentioned in the contract and the consideration named in the deed, payable in two years thereafter, which was subsequently paid. The action was tried by a referee, and on the evidence he found that "at the time of the execution and delivery of these last mentioned instruments the parties, Lawrence and Tilson, were together at the house of the defendant, and the exclusive privilege claimed in this suit was a matter of conversation between them. Lawrence desired a conveyance of that as well as the land. Tilson did not convey it, assigning as a reason that his wife declined. Lawrence stated that he relinquished no rights given him by the contract." Lawrence used the quarries upon the land conveyed to him up to 1854, when he assigned his interest in the contract to the plaintiff for two hundred and fifty dollars. In April, 1854, the plaintiff demanded a conveyance of the exclusive privilege mentioned in the contract, and upon the refusal of the defendant brought this action. The referee found, as matter of law, that the action was barred by the statute of limitations, and gave judgment against the plaintiff, dismissing the complaint, with costs.

From the judgment of the Supreme Court at general term, affirming the judgment of the referee, the plaintiff appealed to this court.

John H. Reynolds, for the appellant.

Amasa J. Parker, for the respondent.

ALLEN, J. Prior to the enactment of the Code of Procedure, the subject-matter of this action was cognizable only by a court of equity, courts of common law having no jurisdiction to entertain a suit for the specific performance of a contract. The cause of action was therefore within the ten years' limitation prescribed.[1] The language of that section is: "Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after." If a cause of action had ever accrued to the original vendor, the plaintiff's assignor, and the statute of limitations had been permitted to run against it, the bar of the statute could not be avoided, and a new cause of action created, upon the same contract, by the demand of specific performance by the assignee, in 1854. The right of action, once barred by statute, can only be revived by the act and assent of the party to be charged. Kelsey *v.* Griswold.[2] The cause of action accrued whenever the plaintiff or his assignee could have filed a bill for the relief sought in this action. If, at any time, without further act on their part, or default or breach of duty on the part of the defendant, they could have come into a court of equity and entitled themselves to a specific performance of the contract, the statute of limitations commenced running from that time, and the lapse of the statutory period of ten years barred the action. In order to put a party in default, in the case of dependent covenants, so as to subject him to an action at law, there must be a tender of performance by the other party to the covenant or agreement, and a demand of performance on his part, and when an act is to be done requiring time for its performance, a reasonable time must be given for such performance unless the party of whom the demand is made absolutely refuses to perform at the first demand. An action at law upon the contract, or to recover back the consideration as upon a rescission of the contract by the act of one of the contracting parties, can only be maintained upon such technical and formal default, unless it may be in some exceptional cases, as when a party has put it out of his power to perform, so that a tender and demand would be nugatory. The rule at law is well settled by a long line of cases, some of which are cited by the plaintiff's counsel. Hackett *v.* Huson,[3] Blood *v.* Goodrich,[4] Connolly *v.* Pierce,[5] Fuller *v.* Hubbard,[6] Lutweller *v.* Linnell.[7] The same principle applies when equitable relief is sought, on the alleged ground of a rescission of the contract by the act or default of one of the parties to it. Brunnell *v.* Jackson.[8] Wells *v.* Smith[9] turned upon the construction of the con-

[1] 2 R. S. p. 301, § 52. [2] 6 Barb. 436. [3] 3 Wend. 249. [4] 9 id. 68.
[5] 7 id. 129. [6] 6 Cow. 13. [7] 12 Barb. 512. [8] 5 Seld. 535.
[9] 2 Ed. Ch. R. 78; affirmed 7 Paige, 22.

tract, the question being whether time was of its essence, and it was held that it was so, and that the complainant had lost his rights under the contract, by not performing at the day. The general discussion by the Vice-Chancellor, of the course of procedure to secure one's rights under such a contract, has no application except in cases falling within the same category. The contract does not in this, as in the case cited, make time essential by prescribing a fixed time for its performance, and making a performance at the day, by either party, a condition precedent to the request to enforce it against the other. The agreement looks to and fixes no particular time for its performance, but imposes a present duty upon the defendant to convey the powers and privileges mentioned, whenever the plaintiff shall request. A previous demand is not, nor is any act on the part of the vendor, made necessary by the terms of the contract, to fix the liability of the defendant. He has promised to convey generally, and is therefore bound to perform upon request; in other words, there is a present liability which may be enforced at any time. The vendor at once acquired a right to a specific performance of the contract by the vendee. When such right exists, it may be enforced in equity without a previous request or demand. The contract not making a request or demand essential to the right of the vendor to enforce performance; the law does not annex it as a condition, and it is sufficient if he offers to perform in his bill of complaint, and is able to perform at the time of the final decree. A request made by action is sufficient, and a request before action is not necessary. The distinction between an action for a specific performance in equity and a suit at law for damages, for non-performance, is this, that in the latter the right of action grows out of a breach of the contract, and a breach must exist before the commencement of the action, while in the former the contract itself, and not a breach of it, gives the action. A demand of performance before suit brought is only important in reference to the costs of the action, and has no bearing upon the merits or the rights of the parties. But by a demand and refusal, the party liable to perform is put in the wrong and in the situation of unreasonably resisting the claim of his adversary, and is, therefore, chargeable with costs. Costs in equity are always in the discretion of the court, and whether they are granted or withheld, they are but as incidents to and no part of the relief sought. A party getting the relief asked may be compelled to pay costs, but nevertheless his cause of action had accrued upon the filing of the bill or the commencement of the suit. Vroom *v.* Ditmas.[1] A party filing a bill for a specific performance upon an offer of performance on his part, and a demand from the other party, must make the proper offer in his complaint; and if he is able to perform at the time of the final judgment he is entitled to his relief, although he may not have been in a situation to perform at the time he brought his suit.[2] Baldwin *v.* Salter,[3] Stevenson *v.*

[1] 4 Paige, 526.

[2] Coffin *v.* Cooper, 14 Ves. 205; Beaumont *v.* Dukes, Jac. 422; Mason *v.* Caldwell, 10

[3] 8 Paige, 473.

Maxwell.[1] The rule is, that the plaintiff, in actions for the specific performance of contracts, must aver and plead performance, or a readiness and willingness to perform on his part. Walker *v.* Jefferys.[2]

It is analogous to the rule of the common law, that a note payable on demand is payable instanter, and the statute commences to run against it from its date; while, if it is payable a given time after demand, or it contains any provision showing the intent of the parties that it should not be payable until actual demand, the rule is otherwise. Wenman *v.* The Mohawk Ins. Co.[3] The vendee has the right, immediately upon the execution and delivery of the contract, to apply to the court of equity for a specific performance, and the only consequence of such immediate application would have been to charge him with costs; but the relief could not have been denied him, merely because the suit might have been ill advised, hasty, and unnecessary. The cause of action thus arose, and the rule of courts of equity is, that the cause of action or suit arises, when, and as soon as, the party has a right to apply to a court of equity for relief.[4] When the party entitled to a specific performance of an agreement to convey land has been in the uninterrupted possession of the premises, an objection to a decree on account of the lapse of time will not be sustained.[5] Miller *v.* Bear.[6] The possession saves the action, and makes the case an exception to the rule which controls other executory contracts. The question of adverse possession, as to which several cases are cited by counsel, is not in the case. It is not an action *in rem*, to secure the realty or its possession, but is an ordinary equitable action to enforce a simple executory contract, upon which the plaintiff and those under whom he claimed have slept upon their rights, until a statutory bar has arisen against them.

Ill. 196, 208, 209; Guild *v.* R. R. Co., 57 Kan. 70 (mortgage to be paid off out of the purchase money); Md. Co. *v.* Kuper, 90 Md. 529; Luckett *v.* Williamson, 37 Mo. 388; Oakey *v.* Cook, 41 N. J. Eq. 350; Brown *v.* Haff, 5 Paige, 235; Dutch Church *v.* Mott, 7 Paige, 77; Baldwin *v.* Salter, 8 Paige, 473 (*semble*); Jenkins *v.* Fahey, 73 N. Y. 355; Wilson *v.* Tappan, 6 Oh. 172; Moss *v.* Hanson, 17 Pa. 379, 382; Lyles *v.* Kirkpatrick, 9 S. Ca. 265; Fraker *v.* Brazleton, 12 Lea, 278; Core *v.* Wigner, 32 W. Va. 277 *Accord.* — Ed.

[1] 2 Comst. 408.

[2] Per V. C., 1 Hare, 352.

[3] 13 Wend. 267.

[4] 2 Stor. Eq. Jur. § 1521, *a*.

[5] S. E. Co. *v.* Knott, 10 Hare, 122 (*semble*); Crofton *v.* Ormsby, 2 Sch. & Lef. 583, 603, 604; Burke *v.* Smith, 3 Jon. & Lat. 193; Mason *v.* Wallace, 4 McL. 77; Day *v.* Cohn, 65 Cal. 508; Gilbert *v.* Sleeper, 71 Cal. 290; Coffee *v.* Emigh, 15 Colo. 184; Green *v.* Finin, 35 Conn. 178; Hall *v.* Peoria Co., 143 Ill. 163; Stretch *v.* Schenck, 23 Ind. 77; Gill *v.* Bradley, 21 Minn. 15 (*semble*); Minneapolis Co. *v.* Chisholm, 55 Minn. 374; Hunkins *v.* Hunkins, 65 N. H. 95; Miller *v.* Beer, 3 Paige, 466; Waters *v.* Travis, 9 Johns. 450, 467; White *v.* Patterson, 139 Pa. 429; Mullens *v.* Big Creek Co., (Tenn. 1895) 35 S. W. R. 438; Williams *v.* Lewis, 5 Leigh, 686; Mudgett *v.* Clay, 5 Wash. 103; Norman *v.* Bennett, 32 W. Va. 614 *Accord.*

If, however, the buyer abandons possession, the question of *laches* may become important. S. E. Co. *v.* Knott, 10 Hare, 122. See, also, Alley *v.* Deschamps, 13 Ves. 225, 229.

On the same principle a bill to compel the execution of a lease by a defendant in possession and paying rent under an agreement for a lease will not be defeated by lapse of time. Sharp *v.* Milligan, 22 Beav. 606; Shepheard *v* Walker, 20 Eq. 659; Clark *v.* Moore, 1 Jon. & Lat. 723. — Ed.

[6] 3 Paige, 466.

The maxim that in equity that which is required to be done is considered as done, is invoked by the plaintiff, in aid of the action. But it is not easy to see how a court can assume a fact as accomplished at the instance of a suitor who alleges that it has not been done, and asks, as the only relief sought, that the court may cause it to be done. It is a maxim applied for the advancement of justice, and as a protection and defence, and it would be a perversion to resort to it in avoidance of a statute of repose. Burch *v.* Mahony,[1] Hasbrook *v.* Paddock.[2] Had the plaintiff been in possession for twenty years, the maxim might avail him if his possession was disturbed by his vendor. Miller *v.* Bear.[3] So, too, the equitable doctrine that the vendor is the trustee for the vendee of such property from the time of the contract, and that the whole title is deemed to pass by the contract, cannot give length of days to an agreement for its conveyance. When dealt with as a contract, it is subject to all the rules which apply to and control other contracts, and cannot by any pretence be taken out of the operation of statutes general in their operation, and applicable to all contracts. If in equity, the title to the real property is vested in the plaintiff, either as against the defendant or third persons, the right, just so far as it has vested, will be protected whenever it is assailed. But when the plaintiff asks the aid of a court of equity to enforce the contract for a legal conveyance, he is within the statutes for the limitation of actions.[4] The plaintiff would have the contract construed as a conveyance *in praesenti*, an executed contract, rather than as an agreement to convey in future, an existing contract. But the whole tenor of the instrument shows that it was intended by the parties as a memorandum of their agreement, and that further acts were contemplated to complete and carry it out, to wit, giving of a conveyance by the defendant, and of a mortgage for the purchase money by the vendee. The parties so construed it by their subsequent acts, and the plaintiff ratifies the construction by bringing this action. It was then an agreement by the defendant to execute upon request, and for the considerations named, a grant of an easement or servitude upon his land, which when executed would have charged the land; but until executed, the contract was preserved, binding only the defendant, and creating no charge upon the land. An agreement for a lease is not a lease, or equivalent to a lease, and an agreement to create or grant an easement is not a grant or its equivalent. If the referee had found that the deed of January 19, 1838, was a substituted and full performance of the contract of the defendant, accepted and acquiesced in by the vendee, the finding would, in my judgment, have been fully sustained by the evidence.

[1] 1 Barb. 648. [2] 1 id. 635. [3] *Supra.*

[4] If the buyer has paid the purchase money, so that the seller holds the legal title purely for the benefit of the buyer, the plaintiff's right to call for a conveyance ought not to be barred unless he has acquiesced for an unreasonable time in the seller's repudiation, by words or conduct, of his obligation to convey. Hemming *v.* Zimmerschitte, 4 Tex. 159. See, also, Conway *v.* Kenworthy, 21 Ark. 9; Iglehart *v.* Vail, 73 Ill. 63. — ED.

But upon the ground upon which the case was decided by the referee, there was no error, and the judgment must be affirmed.

Judgment affirmed.[1]

[1] Lewis *v.* Prendergast, 39 Minn. 301; Cooley *v.* Lobdell, 153 N. Y. 596, 602, 603 *Accord.* If the plaintiff has tendered due performance on his part, and the defendant has refused to perform, a failure to bring suit until after the lapse of the period of limitation precludes recovery. Walker *v.* Ray, 111 Ill. 315; Peters *v.* Delaplaine, 49 N. Y. 362. — ED.

SECTION IX.

Fraud, Misrepresentation, and Concealment.

CADMAN *v.* HORNER.

In Chancery, before Sir William Grant, M. R., November, 1810.

[18 *Vesey*, 10.]

The bill prayed the specific performance of an agreement, by which the defendant contracted to sell the fee-simple of certain premises for the sum of 600*l.*, payable by instalments. The agreement was signed by both parties; and the defendant, having received part of the purchase money, resisted the performance, on the ground that the plaintiff, who was his agent, had misrepresented the value of the estate; producing evidence that it was worth near 1200*l.*; also that the plaintiff had previously to the agreement represented to him that the houses had been injured by a flood, and would require between 50*l.* and 60*l.* to repair them; whereas, in truth, the premises at the time of the contract required no more than forty shillings to put them in complete repair. No evidence of the value of the premises was entered into by the plaintiff: but the defendant in his answer admitted that the clear yearly rent amounted to 40*l.*; and stated that in 1805 he had purchased these premises for 700*l.*, and had afterwards expended 300*l.* in repairing them.

The Master of the Rolls. The evidence of the inadequacy of the price in this case is considerably shaken by the defendant's admission of the clear rent of the premises. It is difficult to conceive that he could be ignorant of the value, having so recently purchased the estate, and laid out money in the improvement of it; and it is not easy to comprehend his conduct: nor does misrepresentation by the plaintiff in regard to what was requisite for the repairs of the houses by any means account for the disparity between the price paid for the estate and the sum at which the witnesses value it; yet, as upon the evidence the plaintiff has been guilty of a degree of misrepresentation, operating to a certain, though a small, extent, that misrepresentation disqualifies him from calling for the aid of a court of equity; where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation in the transaction. This is not a case where the court is called upon to rescind an agreement, and to decree the conveyance, executed in pursuance of it, to be delivered up to be cancelled; which would admit a different consideration.

The bill was dismissed without costs.[1]

[1] See Drysdale *v.* Mace, 5 D. M. & G. 103, 107. — Ed.

TROWER *v.* NEWCOME.

IN CHANCERY, BEFORE SIR WILLIAM GRANT, M. R., JUNE 29, 1813.

[3 *Merivale*, 704.]

THIS was a bill, by the vendor, for specific performance of an agreement to purchase the advowson of Honychurch, in the county of Devon. The bill stated (which was admitted by the answer), that the plaintiff, being seised in fee of the advowson in question, caused the same to be set up to sale by auction, when the defendant became the purchaser, according to the conditions of sale. The printed particulars contained a description of the situation, number of acres, etc., and added "a voidance of this preferment is likely to occur soon," but made no mention of the present incumbent.

The defendant, by his answer, said he was induced to attend at the sale by the representation in the particulars above noticed; that the auctioneer, at the time of sale, said (in explanation) "that the living would be void on the death of a person aged eighty-two," of which the defendant took a note in writing, or a copy of the particulars; and that he was, by such statement, induced to bid, and did bid accordingly; and was declared the purchaser, and signed the agreement. He then proceeded to state, that he (the defendant) had, since the sale, discovered that the then present incumbent of the living was aged only thirty-two, upon which discovery, his (the defendant's) solicitor, sent back the abstract (which had been furnished) to the plaintiff's solicitor, with a note on the margin, stating the representation made at the time of sale, with these words added: "How does it become void?" to which the plaintiff's solicitors returned for answer, "We do not consider the purchaser entitled to call for any security for the voidance of the living, at the death of a person aged eighty-two. No such security was required at the sale, and the auctioneer only stated that such a voidance would take place. We have no objection, however, to the patron engaging by covenant or bond, that the present incumbent will avoid the living on the death of a gentleman aged eighty-two."

Upon this statement, the defendant insisted, that the particulars of sale, and the representations made by the auctioneer, were untrue, and calculated to mislead, and that they did, in fact, mislead the defendant; and that he (the defendant) would not have bid for, or become the purchaser of, the advowson, if he had not given credit thereto; and that he, therefore, ought not to be compelled to complete the purchase.

It appeared in evidence that the incumbent of Honychurch expected to be presented to another living on the death of its incumbent, who was aged eighty-two, which would cause the voidance of Honychurch.

The Master of the Rolls thought the representation made by the printed particulars so vague and indefinite that the court could not take notice of it judicially, and that its only effect ought to have been to put the defendant upon making inquiries respecting the circumstances under which the alleged evidence was likely to take place, previous to his becoming the purchaser. That such a representation was capable of being supported by the fact, either of the incumbent being old, or infirm, or by various collateral circumstances. His Honor compared this representation to that made in a case lately before him, respecting the purchase of a leasehold estate, which was stated in the particulars to be renewable "on the payment of a small fine;" leading to the question, "What is a small fine?" with reference to the circumstances of the property, and the expression being so vague that no importance whatever could be attached to it.

Specific performance decreed.[1]

SCOTT *v.* HANSON.

In Chancery, before Sir J. Leach, V. C., August 14, 1826.

[1 *Simons*, 13.]

An estate, sold by auction, was described, in the particulars of sale, as consisting of fourteen acres of uncommonly rich water meadow land, let on lease with other land for a term of which four years were unexpired; and it was then stated that the apportioned rent for this lot was 75*l.*

A suit having been instituted by the vendor for a specific performance of the contract, it appeared in evidence that, on account of the high level of this meadow and the low level of some adjoining land, the former was imperfectly watered. It was objected, for the purchaser, that it was not proved to be a water meadow. But the Vice-Chancellor, ruling that a meadow which was watered, though imperfectly, was not improperly described as a water meadow, it was then insisted that to describe it, in the particular, as uncommonly rich water meadow land, was a misrepresentation; and that a court of equity ought not to assist the vendor, but should leave him to his action at law.

For the vendor it was argued that the principles as to representation were the same in equity as at law; that the real quality of this land, being an object of sense, and obvious to ordinary diligence, it was the fault of the purchaser if he did not inspect it and judge for himself; that the amount of the annual rent being stated, which was the criterion of the value, the purchaser could not be deceived; that when the land was said to be *uncommonly* rich, it was spoken of com-

[1] See Stewart *v.* Alliston, 1 Mer. 26. — Ed.

paratively only; and that the question throughout the cause had been, not whether the land was uncommonly rich water meadow, but whether it was water meadow at all.

The cases cited for the plaintiff were Fenton *v.* Browne,[1] and Trower *v.* Newcome.

The Vice-Chancellor took time to consider the case, and then gave judgment to the following effect: —

I do not accede to the argument that the principles upon the subject of representation are uniformly the same in equity as at law; for, in the case of Stewart *v.* Alliston,[2] Lord Eldon, C., states the doctrine of the court to be otherwise. In a bill for a specific performance it is not sufficient to say that the purchaser has been negligent, if the vendor, who seeks the aid of a court of equity, has, in his conduct, been incorrect. I agree with Sir William Grant, M. R., in the case of Trower *v.* Newcome, that a representation which is vague and indefinite is to be treated, by a purchaser, only as a ground for inquiry; and the doubt in that case is whether the purchaser was not justified in concluding that the representation amounted to a statement that the incumbent was eighty-two years of age. Unless the expression, used in this case, can be considered as a representation that the land in question was not imperfectly, but perfectly watered, then the expression is vague and indefinite; and, upon the best consideration I can give this case, I think I should strain the meaning of the words "uncommonly rich water meadow land," if I were not to confine the meaning to the quality of the land, and, in that sense, it professes to be nothing more than the loose opinion of the auctioneer, or vendor, as to the obvious quality of the land, upon which the vendee ought not to have placed, and cannot be considered to have placed any reliance. I lay no stress upon the circumstance that a rent of the land is mentioned in the particular of sale; because it is not a rent fixed by contract with the lessee, but a part of a gross rent paid for the land in question and other premises comprised in the same lease; and is arbitrarily apportioned by the vendor. The purchaser must therefore complete his contract.[3]

[1] 14 Ves. 144. [2] 1 Mer. 26.

[3] Affirmed by Lord Lyndhurst, C., in 1 R. & My. 128. See Johnson *v.* Smart, 2 Giff. 151.

In Fellowes *v.* Lord Gwydyr, 1 R. & My. 83, specific performance was decreed against a defendant, Page, who acted on the false representation of the plaintiff that he was the authorized agent of Lord Gwydyr. This decision has been deservedly criticised by Gibson, C. J., in Fisher *v.* Worrall, 5 W. & S. 478, 483, and by the learned author in Pollock, Contracts (6th ed.) 102. It is opposed likewise to the common law decision in Bickerton *v.* Burrell, 5 M. & S. 383, and to the equity decision in Archer *v.* Stone, 78 L. T. Rep. 34. There was, in truth, no mutual assent and therefore no contract in the case criticised. — Ed.

T. KELLY *v.* CENTRAL PACIFIC RAILROAD CO.

SUPREME COURT, CALIFORNIA, JANUARY 25, 1888.

[74 *California Reports*, 557.]

HAYNE, C.[1] Action for specific performance of a contract to convey land.

The Central Pacific Railroad Company, being the owner of large tracts of land acquired from the federal government, placed the disposition of the same in the hands of one of its officers, called its land agent.

In the exercise of his functions the land agent addressed a circular to the public inviting settlement upon its vacant lands, and stating, among other things, that "settlers and actual occupants who in good faith cultivate and improve lands belonging to either of the companies will *generally* be given preference of purchase at the regular price."

It appears that in the spring of 1881, one Menger, who was then in occupation of the south half of the northeast quarter of section 7, in township 13, range 9 east, Mount Diablo base and meridian, and of an adjoining piece, received the above-mentioned circular, and certain verbal assurances, and after several months sold and conveyed whatever rights he had to one Cole. Cole moved upon said land, and continued to reside upon it and make improvements on it, relying upon said circulars.

During all of this time the plaintiff, Kelly, had brought himself within the terms offered by said circular, as to certain adjoining land, but had never done so as to the land in controversy. It sufficiently appears, we think, that Kelly had notice of Cole's equities.

Kelly filed with the land agent an application to purchase certain lands, including the tract in controversy, and represented to the land agent that he, Kelly, had settled upon the same. The land agent, believing these representations, entered into a contract with Kelly for the conveyance to him of this and other tracts, and received from him the first payment therefor. These representations of Kelly were entirely false.

Upon becoming aware of the deception which had been practised upon him, the land agent notified Kelly that he could not have the tract in controversy, and tendered him back the portion of his first payment which applied to that tract. Kelly refused to receive the money, and brought this action to compel the conveyance to him of all the land mentioned in the contract. Cole intervened and prayed

5 W. & S. 475, 483, and by the learned author in Pollock, Contracts (6th ed.), 102. It is opposed, likewise, to the common law decision in Bickerton *v.* Burrell, 5 M. & S. 383. — ED.

[1] A portion of the opinion is omitted. — ED.

for the conveyance of the land in controversy to him. The court below decreed that the land be conveyed to Cole, and Kelly appeals.

The point made on Kelly's appeal is, that the false representation was not productive of injury to the railroad company. And the argument is that there was no injury, because, in the first place, it was under no obligation to convey to Cole, and because, in the second place, the company was willing to convey and will convey the land to Cole for the same price that it agreed to convey it to Kelly, and hence could not be injured pecuniarily.

We think there are two answers to the argument for the appellant.

1. Assuming the correctness of appellant's major proposition, — viz., that in order to defeat a suit for specific performance on the ground of fraud, the fraud must be productive of injury, — it is not necessary that the injury should result *to the vendor*. It is sufficient if it would result to third persons. It is upon this principle that the relief is refused, where the thing to be done would operate as a fraud upon the public. Thus a court will refuse to decree specific performance of an agreement to publish a book purporting to be written by one person, but in fact written by another. Post *v.* Marsh.[1] So, upon the same principle, the relief is refused where the agreement was in fraud of the rights of creditors (St. John *v.* Benedict,[2] Baldwin *v.* Campfield,[3] Ryan *v.* Ryan[4]), or in fraud of the rights of other parties. Kitchen *v.* Coffyn.[5] So it is refused where the act sought to be enforced would operate to the injury of interests in remainder (Fry on Specific Performance, p. *141, sec. 304; Thomas *v.* Dering[6]); or to a wife's right in a homestead (Phillips *v.* Stauch[7]); or to subsequent purchasers from the same vendor. Curran *v.* Holyoke. The court will not make itself an instrument to carry out the fraud, whether the person to be injured be a party to the contract or not. It will not assist the plaintiff to get the benefit of the intervenor's labor and improvements upon the tract in controversy.

2. But we do not think that in order to defeat a suit for the specific performance of a contract to convey land, upon the ground of fraud, the fraud must be productive of damage either to the vendor or to third persons. If the misrepresentation was intentional, and made for the purpose of deceiving the vendor, and the vendor relies upon it, and was deceived by it, and would not have entered into the contract but for the fact that he was so deceived, then we think a court of equity will not enforce the contract, whether it be accompanied by damage or not. So far as this kind of suit is concerned, such a misrepresentation is material although not accompanied by damage.

The counsel for the appellant cite in this connection the case of Morrison *v.* Lods,[8] as affirming the contrary doctrine. The report of that case is somewhat obscure. It does not show what the represen-

[1] L. R. 16 Ch. D. 406.
[2] 6 Johns. Ch. 117.
[3] 8 N. J. Eq. 600.
[4] 97 Ill. 40.
[5] 4 Ind. 507.
[6] 1 Keen, *747, 748.
[7] 20 Mich. 383.
[8] 39 Cal. 385.

tation was, nor whether it was intentionally false or a mere innocent misrepresentation. But if the court meant to decide that a court of equity will enforce a contract obtained solely through a false and fraudulent representation, then we think the decision is in violation of established principles. It is perfectly true, as stated in the opinion, that an action at law cannot be maintained for fraud unless accompanied by damage. It is also true, as stated in the opinion, that a court of equity will not set aside a contract obtained through fraud unless it be productive of injury. (1 Story's Eq. Jur., sec. 203.) But it is not true that this applies to suits for specific performance. It is well settled that a court of equity may refuse specific performance of a contract which it would not set aside. (Mortlock *v.* Buller,[1] Cadman *v.* Horner, Seymour *v.* Delancy,[2] Jackson v. Ashton,[3] Barksdale *v.* Payne,[4] Frisby *v.* Ballance,[5] Clement *v.* Reid,[6] Taylor *v.* Merrill;[7] Hilliard on Vendors, 445; Fry on Specific Performance, Am. ed., p. *192, sec. 427.)

Although the court will refuse to destroy the contract, it will not further in any way the fraudulent design. In such cases, by an application of the maxim, that he who comes into equity must come with clean hands, the court is enabled to give greater effect to the principles of morality than can be done in ordinary cases. The leading text-writers are agreed in this view. . . .[8]

In the present case the false and fraudulent representation of plaintiff was the inducing cause of the contract. This is apparent from the fact that as soon as the company discovered the fraud which had been practised upon it, it repudiated the contract. And it is expressly found that "the land agent, but for such deception, would not have awarded said south half of northeast quarter to said Kelly, but would have awarded it to said Cole."

This state of facts well illustrates the wisdom of the doctrine which does not insist upon measuring everything by the standard of damage, but so far as can be done, allows parties to determine what is for their own interests, and to contract or refuse to contract accordingly. It is evident from the circulars contained in the record that it was the policy of the company to encourage the settlement of its vast tracts of unoccupied land. To carry out this policy it offered special inducements to settlers. It ought to be allowed to fulfil its promises to those who have relied upon its good faith. It is not for one who falsely pretends to be entitled to the benefit of those promises to say that it is all the same to the company because he pays the same price as the other would.

Appellant's case against the company, therefore, fails. And this being so, he cannot inquire into the correctness of the decree direct-

1 10 Ves. *308.
2 6 Johns. Ch. *222.
3 11 Pet. 248.
4 Riley, *178.
5 4 Scam. 299.
6 17 Miss. 542, 543.
7 55 Ill. 61.

8 The court here cited 2 Kent, Com. 490; 1 Story, Eq. Jur. § 206; Kerr, Fraud and Mistake (Am. ed.), 357, 358; 2 Hovenden, Fraud, 4; Fry, Sp. Perf. (Am. ed.) *204; and section 3391 of Cal. Civ. Code. — Ed.

ing the company to convey to the intervenor. For if he is not entitled to the specific thing, it is of no consequence to him what becomes of it, and he cannot concern himself with that question.

VISCOUNT CLERMONT *v.* TASBURGH.

IN CHANCERY, BEFORE SIR T. PLUMER, M. R., DECEMBER 10, 1819

[1 *Jacob and Walker*, 112.]

THIS suit was instituted for the specific performance of an agreement between the plaintiff and defendant, who were possessed of contiguous estates in the County of Norfolk, for an exchange of some lands lying on the boundary.

The land belonging to the defendant, which was comprised in this agreement, was, at the time, in the possession of two tenants, Chasteney and Garrood, under an agreement for a fourteen years' lease. The answer stated that the plaintiff came to the defendant, and informed him that he had seen the two tenants, and that they were perfectly agreeable to the exchange, and that he had settled everything with them, and that, trusting to this representation, he himself consented, and drew up and signed the agreement, in which, from confidence in the plaintiff, no mention was made of the tenants having assented. Had it not been for his belief of the plaintiff's assurances, the defendant would not, he said, have entered into the agreement; and finding, the next day, that the tenants had in fact not given their consent, he wrote to the plaintiff, stating his determination to put an end to it. He submitted that, until the plaintiff should have procured the assent of the tenants, he was not entitled to call for a performance of the agreement.

After the answer was filed amendments were made in the bill, charging that Chasteney and Garrood were willing to give up their interests in the lands of the defendant, upon being paid the value of such interests, which, according to the agreement, ought to be paid by the defendant; and also charging that the defendant could make a good title, subject to the interests of Chasteney and Garrood, in which case the value would be proportionally reduced.[1]

THE MASTER OF THE ROLLS. This bill is filed by Lord Clermont, for the specific performance of an agreement. The defendant having in his answer admitted the fact that the agreement in question was made and signed, and, further, that it was drawn up by himself, it lies upon him to show why he should not be compelled to execute it.

On his part it has been urged that he is absolved from the obligation of this contract, on the ground of its having been obtained by mis-

[1] The statement of the case is slightly abridged, the arguments for the plaintiff and a small portion of the judgment are omitted. — ED.

representation. On this point there are two questions: first, whether it was so obtained; and, next, if that was the case, what the effect of it will be: whether it entirely puts an end to the agreement, and deprives the plaintiff of the right of having it performed, or whether, as has been contended for him, it only vitiates it *quoad hoc*, and leaves him at liberty to take the lands, subject to the interests of the tenants, which he stated them to be willing to resign.[1]

Under these circumstances, supposing this fact to be made out, the next question is, what will be the consequence of it. On the part of the plaintiff, it was argued very judiciously, that, supposing the fact of misrepresentation proved, it does not go the length of establishing that the bill must be dismissed, or of preventing the plaintiff from having a right to a specific performance, if he will take the estate subject to the lease. It was urged that it would be of no consequence to the defendant if the plaintiff would abide by the agreement, exonerated from what is affected by the misrepresentation. To this it is to be observed, in the first place, that it is not the case made by the bill. It is there said throughout, that if the land is to continue subject to the lease, it must be considered as reduced in value, evidently meaning that as by the agreement possession was to be given, the defendant must make a compensation if that article is not performed. But it was contended at the bar, that if the fact of misrepresentation was made out, and that the defendant had in consequence of it undertaken to put the plaintiff in possession, in which case it is impossible, that he should be bound to make such a compensation; yet if that part of the contract be waived, that whatever may be the effect on the costs of the suit, if the plaintiff be willing to pay the costs, and relinquish whatever was the effect of misrepresentation, he may demand the performance of the rest.

Thus, what was asked at the bar, is not what is prayed in the bill; and if it were, it would be contrary to those principles on which the court acts in decreeing specific performance. There is no authority anywhere, no case where the court has, when misrepresentation was the ground of a contract, decreed the specific performance of it; and nothing would be more dangerous than to entertain such a jurisdiction. The principle on which performance of an agreement is compelled, requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame: misrepresentation, even as to a small part only, prevents him from applying here for relief.

The reason of this is obvious: if it be so obtained, the contract is void both at law and in equity. When an agreement has been obtained by fraud, is the effect to alter it partially, to cut it down or modify it only? No; it vitiates it *in toto;* and the party who has been drawn in is totally absolved from obligation.

1 The Master of the Rolls found that the plaintiff had made the misrepresentation, but added: "I hope I shall not be understood to act under the impression of the misrepresentation having been wilful; it arose no doubt from misunderstanding." — Ed.

If so, what equity has the other party, who, by his misconduct has lost one contract, to call on the court, for his benefit to make a new one? If the defendant were willing to consent to it, and to enter into a new agreement, it would be a different case; but if he refuses, if he insists that he is absolved from it, what equity can there be in favor of the other?

There are many cases where, although a contract cannot be literally performed in all its parts, the court will modify it, attending to the substance of it, and carry it into execution, relieved from the collateral circumstances that form the difficulty. There are cases of this kind where, from lapse of time, it has become unconscientious to insist upon the agreement *modo et formâ*, or where there happens to be a small deficiency in the number of acres. Here the contract becomes inoperative at law, and cannot be strictly performed; yet the court will decree it, dispensing with the articles that are not essential to the substance. But this is only where there has been a perfect *bona fides;* there is no case where it has been done at the instance of a plaintiff, who has practised any misrepresentation. The principle is, that the party is barred, personally barred. It was on this principle that the late Master of the Rolls, in Cadman *v.* Horner, says: "As, upon the evidence, the plaintiff has been guilty of a degree of misrepresentation, operating to a certain, though a small extent, that misrepresentation disqualifies him from calling for the aid of a court of equity, where he must come, as it is said, with clean hands. He must, to entitle him to relief, be liable to no imputation." He takes the distinction between the case of a bill for specific performance and the cases where the court is called upon to rescind the agreement, which, he says, would admit of a different consideration; and he puts the refusal of relief on the ground of the misrepresentation forming a personal bar.

If it were otherwise, and if a contract under these circumstances were only to be altered *pro tanto*, and only the part thus obtained were to be taken out of it, what encouragement would be offered to fraud. The party, if not found out, would gain his object; and if detected, would have the benefit of the contract, in the same manner as if he had practised no deception. The court has therefore settled that he must come with perfect propriety of conduct. If he does not, that alone is sufficient answer to him.

Again, consider it with reference to the contract itself. The defendant cannot give possession of the land, as his tenants do not consent; he engaged to do it under a wrong idea; he cannot, therefore, be compelled to do it. That part of the contract cannot be performed; there is, therefore, an end to *that* contract: it cannot be performed specifically, and there is no reason here to substitute another in its place. If the plaintiff came for the strict performance of the contract, terms might be put on him, but how can we put terms on the defendant? By the misconduct of the plaintiff, that agreement is at an end; and can we, on that account, say to the defendant, you must

not perform that agreement, but you must, instead of it, perform another?

In both ways, therefore, first viewing the misrepresentation as a personal bar to the plaintiff, and, secondly, as destroying the contract, I am of opinion that he is entitled to no relief. The whole of the bill is negatived by the evidence; while the case of the defendant is proved. The bill must be dismissed and with costs.[1]

BOWLES *v.* ROUND.

In Chancery, before Lord Loughborough, C., July 19, 1800.

[5 *Vesey*, 508.]

The object of the bill was to obtain a specific performance of an agreement entered into by the defendant to purchase a meadow, called Burnett's Meadow, near Clewer, which was sold by auction to the defendant for £950.[2]

The objection made by the defendant was, that the premises were described as a meadow, consisting of fifteen acres, without any notice of a footpath across it.

Lord Chancellor. Certainly the meadow is very much the worse for a road going through it; but I cannot help the carelessness of the purchaser, who does not choose to inquire. It is not a latent defect.

Decree according to the prayer of the bill, with costs.[3]

[1] See Stewart *v.* Alliston, 1 Mer. 26. — Ed.

[2] The case is slightly abridged. — Ed.

[3] Dyer *v.* Hargrave, *supra*, 245; Cook *v.* Waugh, 2 Giff. 201 *Accord.*

Reliance upon the misrepresentation. — If a material misrepresentation is made to induce one to enter into a contract and he does enter into the contract, he will be presumed, as a matter of fact, to have acted in reliance upon the misrepresentation. Redgrave *v.* Hurd, 21 Ch. Div. 1, 21; Smith *v.* Land Corporation, 28 Ch. Div. 7, 16; Smith *v.* Chadwick, 9 App. Cas. 187; Arnison *v.* Smith, 41 Ch. Div. 348, 369. But if the defendant did not rely upon the misrepresentation in entering into the contract, he cannot use it as a bar to a claim for specific performance. Clapham *v.* Shillito, 7 Beav. 146; Clarke *v.* Mackintosh, 4 Giff. 134. This is obviously the case, if, when or after a misrepresentation is made, the defendant knows the truth and still makes the contract. Lord Brooke *v.* Rounthwaite, 5 Hare, 298, 306; Nene Valley *v.* Dunkley, 4 Ch. Div. 1, 4; Thweatt *v.* McLeod, 56 Ala. 375.

Immateriality of the misrepresentation. — In Wuesthoff *v.* Seymour, 22 N. J. Eq. 66, a false representation that a public alley over part of the premises of the seller was only a private way was decided to be immaterial. But the adverse criticism of this decision in Pomeroy, Contracts, 310, seems well founded.

If the representation as to the rental of property sold, though false when made, accorded with the facts before the time for completion of the sale, it will be regarded as immaterial. Goddard *v.* Jeffrey, 51 L. J. Ch. 5.

May assignee rely upon misrepresentation to assignor? — This question seems not to be answered by the decisions. In Smith *v.* Clarke, 12 Ves. 477, 484, Lord Eldon said: "If the person who purchased had a fraud practised upon him, I do not say he might not avail himself of it; but I should require a strong case of fraud against the original purchaser to induce me to give the benefit of it to his assignee." — Ed.

SHIRLEY *v.* STRATTON.

IN CHANCERY, BEFORE LORD THURLOW, C., EASTER TERM, 1785.

[1 *Brown, Chancery Cases*, 440.]

THIS was a bill for specific performance of an agreement for the purchase of an estate in marsh-land, at Barking, in Essex, and for payment of a sum of 1000*l.* the purchase money. The defence was that the estate was represented to the defendant as clearing a neat value of 90*l. per annum*, and no notice was taken to him of the necessary repair of a wall to protect the estate from the river Thames, which would be an outgoing of 50*l. per annum*. And it appearing, upon evidence, that there had been an industrious concealment of the circumstance of the wall, during the treaty,

LORD CHANCELLOR dismissed the bill, but without costs.

WALL *v.* STUBBS.

IN CHANCERY, BEFORE SIR T. PLUMER, V. C., AUGUST 25, 1815.

[1 *Maddock*, 80.]

THIS was a bill filed by the vendor of an estate, against the vendee, for a specific performance of the agreement to purchase. The specific performance was resisted, on the ground, that misrepresentation had been employed to induce the vendee to purchase the estate at a price much beyond its value.

A great deal of evidence was adduced; by the plaintiff, to prove that the estate was of the value it had been represented to be; and by the defendant, to show that it was of much less value.

The VICE-CHANCELLOR entered into a very minute consideration of the evidence; and thought there was proof, by persons best able to form a judgment, of great misrepresentation as to the value of the estate, which appeared to be worth 5000*l.* less than it was represented to be; and considered that as a sufficient ground to refuse a specific performance; relying for authority, upon Buxton *v.* Lister, Howard *v.* Hopkins,[1] Higginson *v.* Clowes,[2] Ellard *v.* Lord Landaffe, Legge *v.* Croker.[3]

His Honor, also, further observed that, whether the misrepresentation be wilful or not;[4] or of a fact latent, or patent, such misrepre-

[1] 2 Atk. 371. [2] 15 Ves. 516. [3] 1 Ba. & Be. 506.

[4] A false representation is none the less a bar to specific performance although the plaintiff was honest in making it. Burrowes *v.* Lock, 10 Ves. 470; Brooke *v.* Rounthwaite, 5 Hare, 298; New Brunswick Co. *v.* Muggeridge, 1 Dr. & Sm. 363; Higgins *v.* Samels, 2 J. & H. 460; *Re* Banister, 12 Ch. D. 131, 142; Redgrave *v.* Hurd, 20 Ch. Div. 1; Mullens

sentation may be used to resist a specific performance, unless the purchaser really knew how the fact was. In this case the plaintiff must be left to his remedy at law. In a court of law, on a proper case made, damages may be given, commensurate to the injury the plaintiff may have sustained; and such court can better examine into all the circumstances of a case like the present, in which there is contradictory evidence. Money is all the plaintiff seeks by his bill, as is the case in all bills by vendors, and money will be given him at law, if he is found entitled to it.

Bill dismissed, without costs.

ELLARD *v.* LORD LLANDAFF.

In Chancery, Ireland, before Lord Manners, C., January 26, 1810.

[1 *Ball and Beatty*, 241.]

The Lord Chancellor.[1] This is a bill for the specific performance of a contract [to grant a new lease for lives], entered into, and signed by both the plaintiff and the defendant. Lord Llandaff insists that the plaintiff is not entitled to relief here, from having suppressed the state of health of Thomas Ellard, the then surviving life in the old lease, and which he alleges formed part of the consideration for granting the new lease.

The circumstances are these: On the 23d of October, 1806, the treaty first commenced. Thomas Ellard was not then in a dangerous state of health, but was able to be out on horseback, though certainly an old man. On the 8th of November following, the treaty was concluded, and Thomas was then *in extremis*, which was known to the plaintiff, and not to the defendant. Then the question is, was that a material fact in the contract? It is manifest Lanigan advised Lord Llandaff to accept of three guineas per acre, taking into consideration the surrender of the lease, then depending on the life of Thomas Ellard; Lord Llandaff therefore calculated on that, as part of the consideration, and to him it appeared a material fact. This was known to the plaintiff, and unless Creswell be perjured, it was equally material to the plaintiff. Creswell states: That on the morning of the 8th of November, when Thomas's life was despaired of, the plaintiff left the house at an early hour, and when he next met him, he apologized for not seeing him before his departure, assigning as the reason, that he was obliged to see Lord Llandaff, before the news of his uncle's illness reached him, that he had concluded the business, and

v. Miller, 22 Ch. D. 199; Wanton *v.* Coppard, 1899, 1 Ch. 92, 97; Boynton *v.* Hazleboom, 14 All. 107; Isaacs *v.* Skrainka, 95 Mo. 517; Best *v.* Stow, 2 Sandf. Ch. 298. — Ed.

[1] Only a portion of the judgment of the court is given. — Ed.

would make a pretty thing of it. Is not this quite decisive to show that, in the opinion of the plaintiff, this was a material fact?

On the part of the plaintiff it has been contended that unless there be a latent defect the principle that governs contracts of this description is *caveat emptor*, and the case of Oldfield *v.* Round is referred to, where it is laid down that the negligence or carelessness of a purchaser is no ground for not executing an agreement; I remember the case perfectly well, and I believe the bar was not very well satisfied with the decision; however, the principle upon which that case was determined, does not apply to the present, the purchaser was undoubtedly extremely negligent, not to look at the estate before he purchased it. Had he used ordinary caution, he would have discovered the easement. Here Lord Llandaff had no reason to suspect that any material change in the health of T. Ellard, between the 23d of October and the 8th of November, had happened; the plaintiff knew the fact, and must know that it was a material fact in the transaction, so as to vary the contract, as treated for in the October preceding. The principles on which dealings of this description are to be carried on are now well understood; this is too sharp a practice to be countenanced here. The plaintiff must not be allowed to deal on a lease, as a good and subsisting one, when at the time he was conscious it was worth nothing, and that the other party was ignorant of that fact. The other authorities referred to were cases where the difference was in the description of the estate, and there was no suppression to vitiate the contract.

It is observed by Lord Hardwicke in Buxton *v.* Lyster: "That nothing is more established in this court than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this court will not decree a specific performance." All the material facts must be known to both parties; and is it not against all principles of equity that one party, knowing a material ingredient in an agreement, shall be permitted to suppress it, and still call for a specific performance?

The bill dismissed with costs.[1]

TURNER *v.* GREEN.

CHANCERY DIVISION, BEFORE CHITTY, J., MAY 15, 1895.

[*Law Reports*, 1895, 2 *Chancery*, 205.]

ADJOURNED SUMMONS.

The object of this application was to enforce the terms of an agreement for the compromise of the action, which the defendant alleged was not binding upon him on the ground of the suppression of a material fact.

[1] See Walters *v.* Morgan, 3 D. F. & J. 718. — ED.

The action was commenced in November, 1894, and by it the plaintiff claimed an account from the defendant as his alleged manager, and a declaration that, under the circumstances, the defendant was not entitled to exercise a certain option of purchase.

Shortly after appearance had been entered, the plaintiff took out a summons for account, under rules of the Supreme Court, 1883, Order XV.: this summons was adjourned from time to time for the purpose of evidence being filed in support of and in opposition thereto, the defendant contending that there was a preliminary question to be tried.

On January 11, 1895, the summons came on for hearing before the chief clerk, who after going fully into the evidence was of opinion that the summons ought to be dismissed with costs; the summons was then adjourned to the judge at the instance of the plaintiff. At 3.30 P. M., in the afternoon of the same day, Fowler, a member of the firm of solicitors acting for the plaintiff, arranged the terms of a compromise of the action with the defendant and his country solicitors at Portsmouth. It appeared that when this compromise was entered into and signed by the defendant, the result of the proceedings before the chief clerk had been telegraphed to Fowler, but was not known either to the defendant or to his solicitors. The information contained in the telegram was not communicated by Fowler to the defendant or his solicitors at this interview.

The defendant alleged that had he known the result of the proceedings before the chief clerk he would not have agreed to the compromise, and declined to be bound by the agreement.

On January 15, 1895, the present summons was taken out on behalf of the plaintiff for a stay of proceedings in the action on the terms of the compromise agreed to on January 11; and, by consent, this application was treated, for the purposes of argument, as though it were an action for specific performance of the agreement.

Evidence was filed on both sides as to what took place at the meeting, and as to the alleged knowledge of the defendant's solicitor of the proceedings in London, the result of which is stated in the judgment.[1]

CHITTY, J. My opinion on the facts is that the defendant's country solicitor did not know that the summons for account had been heard that day before the chief clerk, and my judgment will proceed on that footing — a footing favorable to the defendant. Then I come to the real question in this case, which is, Ought the court to decline to enforce this agreement because Fowler, being aware of the circumstance that the chief clerk had expressed his opinion, — which, however, did not amount to a decision, — did not disclose that circumstance to the defendant and his solicitors when the terms of this compromise were being settled?

The question thus raised is not one of fraud, but one as to the doctrine of the court in granting relief against a claim for specific per-

[1] The arguments of counsel are omitted. — ED.

formance, where the court has a discretion; but that is, of course, a judicial discretion, which cannot be exercised arbitrarily, but only according to settled principles laid down for it by the authorities. I will take the proposition laid down by Sir Edward Fry in his book (3d ed. p. 325, par. 705) as a good exposition of the law; there he says: "Mere silence as regards a material fact which the one party is not under an obligation to disclose to the other cannot be a ground for rescission or a defence to specific performance."

It cannot be contended that Fowler was under any obligation to disclose the result of the telegram; therefore Mr. Butcher, who argued his case with skill and ingenuity, was driven to say that it was a shabby trick on Fowler's part not to disclose the information he had received, and that such conduct was not consistent with the usual practice of solicitors of high standing in their dealings with one another, who would ordinarily have disclosed any such circumstance; therefore, he argued that specific performance ought to be refused, because the course adopted in this case would be generally condemned by high-minded men. I find myself unable to act judicially on any such ground. Had there been any overreaching by Fowler, or any misleading conversation with reference to the proceedings in London before the chief clerk, at the time the terms of the compromise were settled, a very different case might have been presented on behalf of the defendant, and in such a case an obligation might have arisen binding Fowler at law or in equity to make a disclosure of all he knew; but I am satisfied on the evidence that no conversation on the subject took place.

The distinction between suppression of a fact and mere silence is a very old one, and is to be found in a passage from Cicero (De Off. lib. iii. c. 13), which is cited by Sir Edward Fry in his book (3d ed. p. 329): "Aliud est celare, aliud tacere; neque enim id est celare quicquid reticeas." The obligation to speak is at the root of this proposition.

In Walters *v.* Morgan,[1] where specific performance of an agreement for a lease was being sought, Campbell, L. C., said[2]: "There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however it may be viewed by moralists. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a court of equity to refuse a decree for a specific performance of the agreement." That is a correct statement of the law, and one which, it appears to me, is not to be confined to the sale of lands or goods, but is of general application, except perhaps in the case of contracts requiring *uberrima fides*, which involve a duty to make full disclosure.

[1] 3 D. F. & J. 718. [2] 3 D. F. & J. 723.

So far, then, without referring to the other authorities which have been mentioned at the bar, the defendant has not made out his defence on this summons. But there is a case in Ireland (cited by Mr. Butcher), which no doubt is in point — the case of Ellard *v.* Lord Llandaff. In that case specific performance was asked "of an agreement for a lease, in consideration of the surrender of an old lease." The old lease depended upon a single life, and that life was, as was known to the plaintiff, but not to the defendant, on the point of expiring when the agreement was entered into: and in those circumstances Lord Manners refused to grant specific performance, and, in his judgment, he certainly makes it a distinct ground. But there was another ground fatal to the plaintiff's case, which was that the contract for a lease was void under the power which had to be exercised for its performance; and inasmuch as that would embarrass the remainderman, though it would not bind him, the Lord Chancellor of Ireland refused also on that ground to grant specific performance. I may say, with regard to that latter ground, that it could not be questioned, in the present day, that it was quite sufficient for the decision of the case; but, as I have said, Lord Manners makes the non-disclosure of the life being *in extremis* the ground for refusing specific performance. He quotes Lord Hardwicke in Buxton *v.* Lister, "that nothing is more established in this court than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this court will not decree a specific performance." Then Lord Manners is reported to have proceeded thus: "All the material facts must be known to both parties; and is it not against all principles of equity, that one party, knowing a material ingredient in an agreement, shall be permitted to suppress it, and still call for a specific performance?" The term used by the Lord Chancellor is "suppress." The Lord Chancellor, whose language I must consider to be properly reported, must have had in his mind that it was the lessee's duty to disclose. It is upon that ground that he expresses his opinion upon this point. If I may be at liberty to say so, I think Ellard *v.* Lord Llandaff was a trying case for any judge, and a case in which possibly a temptation might arise to strain the law. I need scarcely add that if that life had dropped, there would be no contract at all, according to the decision of the Court of Exchequer in Strickland *v.* Turner.[1] I think, having regard to subsequent authorities, I must take that as a decision, that where there is a duty, — or referring back to Sir Edward Fry's proposition slightly varied, — that where there is an obligation to disclose, the non-disclosure is a defence to a specific performance action. I have not been able to discover — nor have the counsel engaged before me, who seem to have searched the authorities on the matter — any special mention of Ellard *v.* Lord Llandaff, either approving or disapproving it as it stands reported. But the learned editor of Fry on Specific Performance does apparently question the authority of the case at p. 333 of

[1] 7 Ex. 208.

the 3d ed., speaking of it in this way: "The case of Ellard *v.* Lord Llandaff, if it is to be supported on the ground of the silence of the lessee as to the fact that one of the lives in the surrendered lease was, at the time of signing the contract, *in extremis*, rests upon this principle: and was so put by Lord Manners in deciding it." "It is possible that silence which would not constitute fraud may yet constitute such unfairness in a contract as to stay the hand of the court." If the case is looked upon as one of great hardship upon the defendant in its very special circumstances, and as one which presented a contract which ought not, on that ground, to be enforced, then the case would stand well upon the ground suggested by Sir Edward Fry. But, in my opinion, the facts of this case fall far short of what is required, even making the assumption I have made in favor of the defendant; and I come to the conclusion that Mr. Fowler's silence, in the circumstances of this case, is not sufficient ground for my refusing specific performance; and I shall make the order accordingly.[1]

FOTHERGILL *v.* PHILLIPS.

IN CHANCERY, BEFORE LORD HATHERLEY, C., JUNE 30, 1871.

[*Law Reports*, 6 *Chancery Appeals*, 770.]

THIS was an appeal by Rowland Fothergill, one of several persons carrying on business in partnership under the style of the Tredegar Iron Company, from a decree of Vice-Chancellor Stuart.

The object of the bill was to compel the specific performance by Joseph Phillips and John Phillips of their agreement to convey their farm to the Tredegar Iron Co. At the time the agreement was made the company had trespassed upon the defendants' farm below the surface and taken out upwards of 2000 tons of coal. These facts were unknown to the defendants.

Vice-Chancellor Stuart dismissed the bill.[2]

LORD HATHERLEY, L. C. Mr. Dickinson made considerable impression upon me while commenting upon the judgment of the Vice-Chancellor; but although His Honor's words might seem at first sight to indicate a wider range, it seems to me, on consideration, that his judgment is really founded upon that on which I found mine, viz., that the gentlemen who are now seeking specific performance of the contract were, at the time when it was entered into, aware of important facts not known to the appellants [respondents], and which ought to have been disclosed to them. This court requires the utmost good faith

[1] In Greenhalgh *v.* Brindley, 1901, 2 Ch. 324, the non-disclosure by a vendor that he had by agreement precluded himself from counting time towards acquisition of an easement of light was no bar to his suit against the vendee for specific performance. — ED.

[2] The statement of the case is condensed and the arguments of counsel are omitted. — ED.

between buyer and seller, and will not specifically enforce a contract which is not entirely according to good faith. In the present case the state of circumstances is not merely that the company knew something with regard to the value of the coal which was not known to the vendors, but that the company knew this fact, of which I must take it on the evidence the vendors were entirely ignorant, viz., that the company had helped themselves to a large portion of the property. If a man knows that he has committed a trespass of a very serious character upon his neighbor's property, and finding it convenient to screen himself from the consequences, makes a proposal for the purchase of that property, he certainly ought to communicate to the person with whom he is dealing the exact state of the circumstances of the case, and to say to him, "I regret that from mistake" (if it be mistake, and I will assume it to be so for the present purpose) "I have taken some two thousand tons of your coal. I do not know what your view of the case may be; I am ready to buy the property out and out, or I am ready to submit to the consequences of an action or an arbitration, or what you like, with reference to this coal which I have taken." The proposal which he makes is not in reality a simple proposal for purchase of the property; it involves a buying-up of rights which the owner has acquired against him, and of which the owner is not aware. He is therefore bound to inform the owner of the circumstances of the case, and is not at liberty to enter into a contract without disclosing his commission of an act which has rendered him liable to certain consequences, and of which act the person with whom he is dealing has a right to be informed in order to know what course he is to adopt. The observations of the Vice-Chancellor, as to the purchasers knowing more of the value than the vendors did, would, if I may venture to say so, have been erroneous if made without reference to the special circumstances of the case. I apprehend it would be an error to say generally that you cannot enforce a contract in this court where the one party knows more of the value than the other does. It happens frequently in the purchase of pictures, for instance, that one party knows a great deal more of the value than the other, and yet the bargain is perfectly good. But I apprehend that the Vice-Chancellor meant his observations to be understood with reference to the circumstances of the particular case, and that when he says the vendors did not know the subject-matter of the contract, he means that they did not know that coal had been taken to the extent of 2000 tons, and that in that state of circumstances they could not be held to the bargain. If, indeed, undervalue were shown, this observation would naturally suggest itself: the case is not merely that the purchasers, being more experienced men, knew the value of the coal better than the vendors, but that the vendors being unable to gain access to the coal, the purchasers took advantage of an unlawful access to it in order to test its value, and did not communicate to the vendors the result. I apprehend that in such a case the court, whatever it might do as to cancel-

ling the contract, certainly would decline to enforce it. The case would, I think, be something analogous to this: Suppose a picture dealer, employed to clean a picture, scrapes off a part of the picture to see if he can discover a mark which will tell him who is the artist, and thus finds a mark showing it to be the work of a great artist; that would not be a legitimate mode of acquiring knowledge for the purpose of enabling him to buy the picture at a lower price than the owner would have sold it for had he known it to be the work of that artist. I do not, however, dwell on that point, as it is not satisfactorily established in my mind that the price was inadequate. The ground of my decision is, that the appellants suppressed the fact of their having wrongfully got a large quantity of the respondents' coal, and so given the respondents a heavy pecuniary claim against them. Mr. Cox contended that this was no prejudice to the vendors, for that they bargained for the sale of the whole concern, so that this coal was paid for. This argument is not sound; for, according to the principle of Martin *v.* Porter,[1] the vendors are entitled to be paid for the coal wrongfully severed a sum much greater than its value while ungotten; and I do not think it possible for a person in any case secretly to subtract from his neighbor's property, and then to bind him by an agreement for the sale of the property without communicating to him the fact of the encroachment. I think that the company have only themselves to blame for the position in which they are placed, and that the decree as a whole is correct.[2]

BYARS *v.* STUBBS.

Supreme Court, Alabama, December Term, 1887.

[85 *Alabama Reports*, 256.]

Appeal from the City Court of Birmingham.

The bill in this case was filed on the 6th April, 1887, by James T. Stubbs, against Thomas J. Byars, and sought the specific performance of an agreement in writing, by which the defendant gave the complainant an option to become the purchaser of his interest in a certain tract of land near Birmingham, containing about 120 acres.[3]

Clopton, J. The proposal of defendant to sell complainant the land in controversy was in writing, and is plain and certain in its terms. It may be regarded as a continuing offer to sell, not being revoked, until the expiration of the time allowed complainant in which

[1] 5 M. & W. 351.

[2] If the agent for a buyer acts also as agent for the seller, concealing from the latter his agency for the former, the buyer cannot enforce the performance by the seller of a contract brought about by the common agent of them both. Hesse *v.* Briant, 6 D. M. & G. 623; Chandler *v.* Pomeroy, 46 Fed. R. 533; Fish *v.* Leser, 69 Ill. 394; Marsh *v.* Buchan, 46 N. J. Eq. 595; Palmer *v.* Gould, 144 N. Y. 671. — Ed.

[3] Only the opinion of the court is given. — Ed.

to accept and comply with the conditions of sale. If accepted by him, in accordance with the provisions of the proposal, it became a completed contract of sale, mutually obligatory; specific performance of which would be decreed, if it possesses all the essential elements and incidents, as a matter of course. Linn *v.* McLean.[1] But the right to specific execution is not absolute, and a decree therefor does not necessarily follow, though the contract may be plain and certain in its terms, and may be obligatory on both parties. Its enforcement rests on the sound discretion of the court, a judicial discretion, to be exercised according to the established principles of equity. An agreement may be valid at law, and there may not be sufficient grounds for its cancellation in equity; and yet, upon a fair and just consideration of the attendant and collateral circumstances, and sometimes of subsequent events, the court will abstain from its enforcement. An essential element is, that the contract must be fair, just, and reasonable in all its provisions, and its specific performance must be exempt from hardship or injustice to either of the parties. The court will refuse to enforce the contract if it be founded in mistake or surprise, or is obtained by any sharp practice, trickery, or undue advantage of position, or by nondisclosure of material facts known by one party, and unknown to the other; or is affected by any inequitable feature. Cowan *v.* Sapp;[2] Hesse *v.* Briant.[3] In 2 Pom. Eq. Jur. § 905, the author states the doctrine as follows: "The suppression of a material fact, or the failure to communicate a material fact by the vendor, without any purpose of deceiving or misleading the other party, and even without having himself any knowledge of the fact, while not affecting the validity of the agreement at law, and not being sufficient ground for its cancellation in equity, because not fraudulent, may still render the agreement so unfair, unequal, or hard, that a court of equity, in accordance with its settled principles in administering the remedy of specific performance, will refuse to enforce the contract against the party who was misled."

In the view we take of this case, we do not deem it necessary to consider and decide, whether complainant accepted the proposal, and tendered the purchase money within the time limited, or whether defendant refused to accept it and make the deed; as to which matters there is much conflict in the evidence. We prefer to rest our decision on the application of the foregoing principles to the case made by the evidence, as to which there is no serious disputation. The complainant lived in the vicinity of the land, which is situate in Jefferson county, and the defendant resided in Franklin county, about one hundred miles distant. In this respect, the complainant had great advantage of situation, and of opportunity of knowing the circumstances which materially affected the value of the land. The first information which complainant received of the amount of the defendant's interest, and the price at which he was willing to sell, was through a letter written by the latter in November, 1886, requesting

[1] 80 Ala. 360. [2] 81 Ala. 525. [3] 6 DeG., M. & G. 623.

complainant to sell his interest, and offering to pay for his services all he could get over five hundred dollars. This communication and authority to sell implied confidence. Without replying to the letter, or attempting to ascertain whether the land could be sold, and at what price, the complainant, the morning after the reception of the letter the evening previous, went to see the defendant in person at his home in Franklin county, and procured from him the agreement to sell complainant his interest in the land for five hundred dollars, to be paid by December 15, 1886; and if not sold by that time, the agreement to be void. According to complainant's own testimony, his sole business and purpose in going to see defendant was to obtain an option on his interest in the land. Why this great haste to procure an option, rather than undertake the agency to sell? The question is readily answered by the surrounding circumstances. Prior thereto, a company, called the East Lake Company, had been organized, and had commenced making purchases of land for development in that vicinity, and was producing what some of the witnesses call "a sort of a boom." This proceeding materially affected the value of the lands in the neighborhood; they began to increase in value, and continued to rapidly enhance up to the time in which the option of complainant was to be exercised, as specified in the proposal to sell. The evidence as to the value of the land greatly differs, the estimates of the witnesses ranging from ten to fifty dollars per acre. It is manifest, however, that the surrounding circumstances were such as would largely influence an owner of land in that section in determining whether he would sell, and in fixing the price at which he would be willing to sell. It is true, the relation of principal and agent was not consummated between complainant and defendant; but the proposition of the latter to employ the former, as agent to sell the land, placed them in a relation, each to the other, which demanded open and fair dealing. We do not mean to say that there was fraud or trickery in procuring the option; what we decide is, that under the circumstances the complainant should have disclosed to defendant the material facts. Instead of so doing, he avails himself of the information communicated by defendant's letter, hastens in person, and obtains an option running through three weeks, without paying any consideration therefor, and which did not bind him in any respect, and suppressed the facts which had so materially affected the present and prospective value of the land; for he testifies that he made no representation of its value. In this, he took an undue advantage of his position and knowledge. The contracting parties did not stand on an equality; and the defendant entered into the agreement in ignorance of the facts. Such being the nature of the contract, and the circumstances under which it was made, a court of equity, in the exercise of its discretion, should abstain from granting a specific performance, and leave complainant to his legal remedies.

The decree is reversed, and a decree here rendered dismissing the bill.

Reversed and remanded.[1]

[1] Cowan *v.* Sapp, 81 Ala. 525 (agreement for a compromise, debtor knowing and creditor not knowing that latter's claim had been reduced to judgment with an execution issued and levied); Hetfield *v.* Willey, 105 Ill. 286 (agreement to sell a partner's interest, seller not disclosing certain firm liabilities outside of the firm's books); Mo. Co. *v.* Brickley, 21 Kan. 275 (buyer aware of seller's ignorance of a coal mine in land sold); Woollums *v.* Horsley, 93 Ky. 582 (expert buyer fails to disclose to seller, an uneducated farmer, the mineral value of latter's farm); Bean *v.* Valle, 2 Mo. 103 (*semble* — non-disclosure by buyer of existence of a mine on seller's land); Livingston *v.* Peru Co., 2 Paige, 390, 391 (*semble*); Margraf *v.* Muir, 57 N. Y. 155 (buyer aware of seller's ignorance of a recent rise in value of the land); Trigg *v.* Read, 5 Humph. 529; Law *v.* Grant, 37 Wis. 548 (plaintiff aware that defendant had contracted because of fraudulent representations of A, a stranger to plaintiff) *Accord*.

In Falcke *v.* Gray, 28 L. J. Ch. 28, 31, Kindersley, V. C., said: "Lord Thurlow went so far as to say, that if a man went to purchase an estate, and there was a valuable mine under it, of which the purchaser knew, but the vendor did not, the court would not set the contract aside; yet no one can doubt that the court would not enforce specific performance of such a purchase. There is a wide difference between the cases where the court is called upon to set aside an agreement, and those where it is called upon to enforce an agreement."

In Livingston *v.* Peru Co., *supra*, Walworth, C., said: "I am not aware of any case in our own courts, or in England, where the simple suppression, by the buyer, of a fact which materially enhanced the value of the property, has been deemed sufficient to set aside the sale, on the ground of fraud. The rule is different where the purchaser applies to a court of equity to enforce the specific performance of an agreement. In such a case this court will not enforce a specific performance of the contract, if the complainant has intentionally concealed a material fact from the adverse party, the disclosure of which would have prevented the making of the agreement; but he will be left to his remedy at law."

The same doctrine is expressed by Chancellor Kent in his Commentaries, vol. ii. p. 490: "There are many duties that belong to the class of imperfect obligations which are binding in conscience, but which human laws do not, and cannot, undertake directly to enforce. But when the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway; and a purchase made with such a reservation of superior knowledge would be of too sharp a character to be aided and forwarded in its execution by the powers of the Court of Chancery." This passage is quoted with approval in 1 *Story*, Eq Jur. (13th ed.) § 206. — Ed.

SECTION X.

Mistake.

MASON *v.* ARMITAGE.

In Chancery, before Lord Erskine, C., July 26, 1806.

[13 *Vesey*, 25.]

The bill stated that the defendant Armitage put up to sale by auction at Norwich, on the 7th of August, 1802, a freehold and copyhold estate; that there were several bidders; and the plaintiff, being the highest bidder, at the sum of 8000*l.*, the estate was knocked down to him at that sum; and he was declared the purchaser. The plaintiff, after the sale was concluded, tendered the deposit, and a moiety of the auction duty to the auctioneer, according to the conditions of sale; but the auctioneer declined to take the money, as the vendor seemed dissatisfied with the sale.

The bill prayed a specific performance of the agreement.

The circumstances upon which the bill was resisted, according to the evidence of the auctioneer and other persons present at the sale, were these.

Armitage, in the usual way, by writing, appointed William Rising to make one bidding for him; there was an interval of seventeen minutes between the time of Mason's last bidding and the time when the estate was knocked down to him. After that bidding the auctioneer laid a watch upon the table; and said, if no farther bidding was made, it would be necessary for him to call on the person appointed to bid for the owner to make his bidding if he thought proper. After waiting about seven minutes the auctioneer inquired of the persons present if they were inclined to make any farther offer, addressing himself to each individual, to those who were known to him by name, and particularly to Rising, by pointedly looking at him, he being the person who was authorized to make the reverse bidding, and to bid once on the part of the owner; and the auctioneer said, "It is with your free will and consent that the estate shall be knocked down at 8000*l.* to Mr. Mason;" and Rising, who sat upon the same seat with Armitage, making no motion whatsoever, the auctioneer asked the company at large whether any one of them chose to make any farther advance on the last bidding, observing, at the same time, that the seller had made no bidding; but no farther offer being made by any person present, and Rising still taking no notice, after some farther pause the estate was knocked down. Immediately after the auction was finished

Rising remonstrated with the auctioneer, insisting that he had no right to knock the estate down to the plaintiff, as he (Rising) expected to have been called upon by name; and said to the plaintiff that as he (Rising) had made this mistake he would give the plaintiff 100*l.* out of his own pocket to relinquish the estate rather than the vendor should be a sufferer on his account. In the course of the sale the auctioneer, being asked whether there were any setters in the room, answered, not that he knew of, but that the vendor had reserved one bidding for himself; and that the company should know when he made that bidding; and after that bidding any person making an advance of 10*l.* should be the purchaser. The auctioneer, being farther asked, who was to bid for the vendor, said he was not at liberty to give up the name.

Rising, by his deposition, stated that great intimacy subsisted between the plaintiff and the defendant Armitage; and previously to the sale, on the same day, Armitage told the plaintiff he had appointed Rising to buy the estate in for him at 9000*l.*, and would not take less; and that the plaintiff had better take the estate for his friend. The plaintiff replied that he had no money, and would have nothing to do with it either for himself or his friend. Rising also stated that he expected to be called upon by name, and did not conceive the general call upon the company to be addressed to him, otherwise he would have bid 9000*l.*[1]

The Lord Chancellor. I admit there is nothing in this contract showing that anything was fraudulently obtained by the plaintiff; and if he had been declared the purchaser, and had got into possession, so that the defendant had been obliged to come into this court upon the head of fraud, there would not be sufficient ground to deprive the plaintiff of the benefit of his legal contract. But that is not this case. This plaintiff has got all the law can give him; and applies here, desiring more; and the question is, whether, under all the circumstances, and upon the authorities and principles, this is a case for a specific performance.

It is not necessary that fraud should be made out. Though from want of attention, misrepresentation, and mistake, a party may have acquired a right at law, this court will not, especially if upon other circumstances the case is hard, decree a specific performance: but the law is open to him: Joynes *v.* Statham.[2] Upon this subject the court is governed by a sound, not a capricious and arbitrary discretion.

In this case I cannot say the plaintiff has acted so as to be an example, though his conduct does not come up to fraud, so that I could have dealt with it as such if he had obtained possession. It is plain, he had talked of purchasing it for his friend; and his answer to the offer made to him that he would have nothing to do with it is rather against him; the defendant on that account not looking to him as a

1 The arguments of counsel and a portion of the judgment and of the statement of the case are omitted. — Ed.

2 3 Atk. 388.

purchaser. Having thus put the defendant off his guard, the plaintiff went into the room; and was considered by every one as a puffer. This is not a damp upon the sale by a circumstance over which the man had no control; as in Twining *v.* Morrice. This arises from his own act. Upon the suspicion that the plaintiff was a puffer, the question was put whether any puffers were present; and then a fair account is given by the auctioneer, that the defendant had reserved one bidding, and any one who would advance 10*l.* upon that should have the estate. This was not private, but a public conventional option not to let the estate go at a particular bidding. The result of the evidence is plain misapprehension and mistake, not an afterthought by the defendant, satisfied at the moment with the sum of 8000*l.*; and as the plaintiff declared, he did not intend to make this purchase, and he has obtained an advantage through a mistake, a court of equity will not give him any assistance in that.

Dismiss the bill without costs.

SWAISLAND *v.* DEARSLEY.

In Chancery, before Sir John Romilly, M. R., March 14, 1861.

[29 *Beavan*, 430.]

The bill prayed for specific performance by a purchaser at an auction sale. The lot in question, viz., lot 5, was described thus: "An undivided moiety in a valuable piece of freehold plantation ground," etc. . . . "let to Mr. Godfrey, a yearly tenant. The apportioned rent of this lot is 16*l.* per annum."

The defendant, by his answer, said: "I bid the sum of 170*l.* in the full belief that the apportioned rent of the property I was purchasing was the sum of 16*l.* per annum; and if I had known that the rent was 8*l.* per annum only, I should not have bid the said sum of 170*l.*" [1]

The Master of the Rolls. In this case, I regret that I have come to the conclusion that I cannot enforce the specific performance of this contract against the defendant, and I regret it because it is clear that the defendant has occasioned this suit by refusing the offer made by the plaintiff to allow the whole contract to be at an end. But the principle upon which this court proceeds in cases of mistake is this: if it appears upon the evidence that there was, in the description of the property, a matter on which a person might *bona fide* make a mistake, and he swears positively that he did make such mistake, and his evidence is not disproved, this court cannot enforce the specific performance against him. If there appear on the

[1] The statement of the case is condensed and the arguments of counsel and a portion of the judgment are omitted. — Ed.

particulars no ground for the mistake, it no man with his senses about him could have misapprehended the character of the parcels, then I do not think it is sufficient for the purchaser to swear that he made a mistake, or that he did not understand what he was about. Such a case is quite different from Malins *v.* Freeman, where a man bought one lot by mistake for another, and, as soon as the auction was over and before signing the contract, stated that he had made the error, and refused to sign the contract.

The present case as it stands is this: Lot 5 is described as "an undivided moiety in a valuable piece of freehold plantation ground, etc., let to Mr. Godfrey, a yearly tenant. The apportioned rent of this lot is 16*l.* per annum." Now I take this in the first place by itself. "The apportioned rent of this lot." What is this lot? It is "an undivided moiety." Therefore, strictly and grammatically speaking, that means that the apportioned rent of the lot (that is, of the undivided moiety) is 16*l.* per annum. In my opinion it certainly must be held that the defendant must have read the whole of the rest of the conditions of sale, and it is quite clear that a person who had considered the thing must have discovered, from the rest of the conditions of sale, that this could not be the apportioned rent of this lot. That undoubtedly is in favor of the plaintiff, but, at the same time, it is not so clearly expressed. He must have read that "the whole of the property at Wilmington was let to Mr. Godfrey at the annual rental of 39*l.*," and he might have added up the amount of the rents of the whole, and a little consideration would, no doubt, have shown him that this could not have been an accurate statement; but still the statement, grammatically, applies to the apportioned rent of lot 5, which is "an undivided moiety." I cannot say, upon that statement, that it is not possible that a person might have been *bona fide* deceived in the amount, and he swears positively he was so deceived.

It is of the greatest importance and the duty of persons who put up property for sale by auction to describe it with perfect accuracy, and not merely in such a way that a person, by drawing proper inferences from everything that is stated in the condition of sale, may be able to ascertain what it is that is sold. Considering these circumstances, and considering also the condition and situation in life of the defendant, which made him liable to fall into an error, which liability the auctioneer himself states, I do not think I ought, acting upon the regulated discretion with which the court deals in matters of this description, to say that I can specifically enforce the contract against the defendant.

The consequence will be that the bill must be dismissed, of course without costs.[1]

[1] Higginson *v.* Clowes, 15 Ves. 516 (misleading particulars); Weston *v.* Bird, 2 W. R. 145 (misleading plan); Baskcomb *v.* Beckwith, 8 Eq. 100 (misleading plan); Denny *v.* Hancock, 6 Ch. 1 (misleading plan and boundary); Jones *v.* Rimmer, 14 Ch. Div. 588 (misleading particulars); Heywood *v.* Mallalieu, 25 Ch. D. 357 (misleading particulars) *Accord.* — Ed.

CHARLES BURKHALTER *v.* JANE JONES.

SUPREME COURT, KANSAS, JANUARY TERM, 1884.

[32 *Kansas Reports*, 5.]

VALENTINE, J.[1] This was an action brought by Charles Burkhalter against Jane Jones, in the District Court of Doniphan county, for the purpose of having an alleged contract corrected, reformed, and specifically enforced.

The plaintiff resided at Troy, Kansas, and the defendant resided at Normal, Illinois, and the supposed contract was made solely by correspondence. This correspondence and the supposed contract made thereby, were with reference to the purchase by the plaintiff of the defendant of sixty acres of land owned by the defendant in Doniphan county, Kansas. This correspondence was simply a continuation of a previous correspondence of the same character, which had been carried on between the plaintiff and the defendant's husband previous to his death, which occurred on August 2, 1883. The first letter received by the defendant from the plaintiff was written about August 16, 1883. This contained a proposition to purchase the land from the defendant. The land at that time was worth about $2400, which was at the rate of $40 per acre. This letter of the plaintiff was clumsily written, but it stated in substance that he had formerly offered the defendant's husband $40 per acre for the land, but that he then thought that $35 per acre would be "a big price for it." He then stated in the letter as follows: "To buy the land now and pay cash down, and not get possession until next spring, and have the taxes to pay on it this fall, I would not want to pay over $2000 for the sixty acres. And counting taxes and interest on the money, that would make it a little over $35 per acre. . . . If that will buy the land, I will take it and pay all the money down." On August 21, 1883, the defendant wrote to the plaintiff, saying, "We will accept your offer," and asking the plaintiff to send her the description of the land, which he immediately did, except that he stated that the land is in range 20, when in fact it is in range 21. On August 25, 1883, she executed a deed to the plaintiff for the land, except that she made the same mistake with regard to the description of the land that the plaintiff did, and she stated the consideration to be $2100, which is at the rate of $35 per acre. She sent this deed to a banker at Troy, Kansas, and instructed the banker to deliver it to the plaintiff upon the receipt of $2100. The plaintiff, however, objected to paying the $2100, and did not pay the same, and the banker did not deliver to him the deed. Afterward the defendant ordered the deed to be returned to her, which was done, and she then sold the land to another person for $2400, being at the rate of $40 per acre.

[1] Only the opinion of the court is given. — ED.

The plaintiff by his letter offered to purchase the land and pay $2000 therefor; but the defendant would seem to have understood that the offer was to pay $35 per acre, which would make the amount to be paid for the land $2100. We think upon the facts of the case that in legal contemplation the plaintiff and defendant entered into a contract for the purchase and sale of the land for $2000; but in equity it can hardly be said that any contract was made between the parties; for in all probability the parties never in fact agreed to the same thing. He offered to pay $2000 for the land, while she in all probability intended to agree to take $2100, and nothing less. He offered to pay $2000, and get possession in the spring of 1884; but when in the spring of 1884? In March, April, or May, and what day of March, April, or May? Possibly she intended to take $2100 and give possession immediately. In all probability she did not understand the plaintiff's letter as he did. And it must be remembered that she is a woman, and a woman who had been recently left a widow, and who was presumably unaccustomed to the transaction of business. Even her letters to the plaintiff were not written by herself; therefore it is not very strange that she should misunderstand the scope and meaning of the plaintiff's letter and the exact character of his offer. In his letter he spoke of $35 per acre, and then of $2000 for the sixty acres, and again of $35 per acre, and then says: "If that will buy the land, I will take it and pay all the money down." The word "that" we would think referred to the $2000; but the defendant in all probability believed that it referred to the $35 per acre. It will be perceived that the plaintiff at no time and in no part of his letter made any direct, explicit, or exact offer to pay $2000 for the land, but simply used the language, "I would not want to pay over $2000 for the sixty acres" and not get possession, etc. He also mentioned the sum of $35 per acre. The court below refused to order or decree that the alleged contract should be specifically enforced, and we do not feel like reversing that decision. The court below did not grant the defendant any affirmative relief, but simply dismissed the plaintiff's action without prejudice, for the purpose that he might commence an action at law for damages if he should choose to do so. Now a stronger case for the specific performance of a contract should be made before a court should order or decree the specific performance of the contract, than need to be made to authorize the dismissal of the plaintiff's action; for if the court decrees the specific performance of the contract, the defendant has no remedy; but if the court dismisses the plaintiff's action without prejudice, as in this case, the plaintiff may commence another action. It must also be remembered that the plaintiff has as yet paid nothing for the land, nor has he obtained the possession thereof. Indeed, he has lost nothing, or at least the only thing which he has lost is the benefit of what he considers to be a very advantageous contract. The only tender of performance which he has ever made or offered to make was the offer to pay $2000, first to the defendant and afterward into court.

Upon the evidence and the findings of the court below we think this is a close case, and really have doubts as to whether a specific enforcement of the alleged contract should be allowed or not. In strict law, and by the words of the letters of the parties, we think the parties made a contract; but we also think that in fact and in equity, the minds of the parties never came together; that they really never agreed to the same thing; and therefore, in equity and good conscience, they did not make a contract, or at least they did not make such a contract as equity should adjudge to be specifically enforced.

The judgment of the court below will be affirmed.[1]

DAY *v.* WELLS.

In Chancery, before Sir John Romilly, M. R., June 6, 1861.

[30 *Beavan*, 220.]

The plaintiff, having purchased the premises in controversy at auction for 162*l.* has instituted this suit against the vendor for specific performance. The evidence was very contradictory, but the circumstances were, in substance, as follows: —

The defendant seemed to have determined that the property should not be sold for less than 240*l.*, and he had arranged with a friend, Mobbs, to attend the sale and bid on his behalf to that extent. They accordingly went to the sale together and saw Mr. Berry and Mr. Hooper.

The defendant, in his evidence, stated, that he told them he had brought a friend to buy the cottages in, if they did not fetch 240*l.*; but Hooper represented that he told them he had brought Mobbs "to run up the property, or what is usually termed puff the sale."

Hooper, being informed that Mobbs was known, said, "It will stop the sale, they won't bid if you let Mobbs bid." He also stated to the defendant, that the expenses of the sale would be 20*l.*, which would be thrown away.

"I gave (said Hooper in his deposition) the defendant, as my advice, 'to leave the matter in the hands of the auctioneer.' He said, 'Very well.' I said, of course he will not give them away, but in a

[1] In Preston *v.* Luck, 27 Ch. Div. 497, the plaintiff, claiming that the correspondence between the defendant and himself established a contract to sell to him a British patent and also foreign patents for the same invention, prayed for an interlocutory injunction restraining the defendant from assigning the patents to any one else. The defendant insisted that the contract covered only the British patent. At the hearing the plaintiff asked for leave to amend his writ and for an injunction as to the British patent only. The Court of Appeal granted the injunction, being of opinion that the plaintiff's erroneous interpretation of the contract did not preclude him from subsequently claiming specific performance according to its true construction.

Mansfield *v.* Hodgdon, 147 Mass. 304, is distinguishable from the principal case, because it is highly probable on the evidence that both parties understood the contract to cover the same land. — Ed.

little matter like this, the expenses of a second sale would eat up the balance, and if any one bids near the sum, it will be well to let them go. He said, 'Very well; then I will tell Mobbs not to bid.'"

The defendant, evidently under the impression that there was to be some sort of reserved bidding, directed Mobbs not to bid; and in his evidence he said that he believed "that the auctioneer would manage it so that either the money would be made, or there would be no sale."

The auctioneer, on the contrary, said, that the defendant instructed him that the sale was to be an absolute sale, and that no reserved price was mentioned. He said "the matter was left to me, and for me to exercise my own discretion; and I did so, to the best of my judgment and ability."[1]

THE MASTER OF THE ROLLS. The perusal of the evidence in this case confirms me that, very unintentionally and without any blame, a mistake was committed with respect to the authority which the defendant supposed he had given Mr. Berry the auctioneer, and which Berry exercised.

The defendant, relying on the statement of Hooper, that Berry would not throw away the property, and thinking that Berry had considerable discretion to buy in the property, refrained from employing Mobbs for that purpose. On the other hand, Berry does not seem to have considered that he had any authority at all to buy it in or to make any reserved bidding. The defendant expected to get 240*l.*, and it was sold for 162*l.*

I think that the case comes within Mason *v.* Armitage, and that there was that species of mistake as to the authority given to the auctioneer, and which the auctioneer conceived he had, which would induce this court to abstain from granting specific performance of the contract. The court exercises its discretion in these cases, but subject to fixed rules, which are laid down in Mason *v.* Armitage and other cases, of which that is a leading authority on the subject.

It is clear that the plaintiff was not at all to blame, and I should not think of giving costs in a case where the mistake has been produced by the defendant.

I do not go into any other question, but I do not affirm any such proposition as this: that a person having given an unlimited authority to an auctioneer may, when dissatisfied with the price at which it is sold, revoke his authority. That is not my opinion at all.

It is true that no fixed sum or reserved bidding was mentioned to the auctioneer, but there must be some limit in such cases. The defendant gave, or he thought he gave, a discretion to the auctioneer to sell, but not to let the property go under a reasonable sum; and in consequence of such belief, he abstained from allowing his friend to bid for him.

I must dismiss the bill without costs.[2]

[1] The statement of the case is abridged, and the arguments of counsel are omitted. — ED.

[2] See Neap *v.* Abbott, C. T. Coop. 333. — ED.

WEBSTER *v.* CECIL.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JUNE 21, 1861.

[30 *Beavan*, 62.]

THIS was a suit by a purchaser for the specific performance of a contract entered into under the following circumstances. After some negotiations between the plaintiff and defendant, the defendant wrote the plaintiff a letter dated the 22d of October, 1860, in which he said "the twenty-one acres of land in question I will sell for 1100*l*., and put Moor Cottage into the bargain. I have only one 10*l*. ground rent left, but will sell you that also if you like (with the rest) for 150*l*."

On the 25th of October, 1860, the plaintiff wrote to the defendant in reply, as follows: —

"As you wish for an immediate answer, I write by return to say I accept your offer to sell twenty-one acres of freehold, together with Moor Cottage, for 1100*l*., and a ground rent of 10*l*. for 150*l*.. making 1250*l*. (twelve hundred and fifty) as the total purchase money for the whole."

On receiving this letter, the defendant became aware that he had made a mistake as to the price asked, and which had occurred in the following way: —

Previously to writing his offer, the defendant had made a calculation upon a piece of paper of the value of each parcel of land called "the twenty-one acres of land in question." The calculation was produced, and was as follows: —

"Moor Ground } The Moor }	£450	0	0
Broad Close	600	0	0
Withy Field } Hearn's Piece }	300	0	0
Bridge Mead	500	0	0
	1,850	0	0
Moor Cottage	250	0	0
	£1,100	0	0

"Told him put M. Cottage into bargain at that price and he may have the 10*l*. ground rent for 150*l*."

It will be observed that the value of the lands and cottage, if correctly added up, amounted to 2100*l*., but through inadvertence and in his hurry to save the post, the defendant added them up as amounting to the sum of 1100*l*. and without reflection inserted that sum in the letter. The property offered for 1100*l*. produced an annual return of 90*l*., and was mortgaged for sums amounting in the aggregate to 1800*l*., and the defendant had already refused to sell it to the plaintiff's agent for 2000*l*.

The defendant immediately wrote to the plaintiff informing him of the error.

The plaintiff, on the 1st of December, 1860, filed this bill for specific performance.[1]

The Master of the Rolls was of the opinion that the mistake had been clearly proved, and that the defendant had immediately given notice of it; and he said that in that state of the case the court could not grant specific performance and compel a person to sell property for much less than its real value, and for 1000*l.* less than he intended. The plaintiff, he said, might bring such action at law as he might be advised.[2]

The bill was dismissed without costs.

MALINS *v.* FREEMAN.

In Chancery, before Lord Langdale, M. R., January 14, 1837.

[2 *Keen*, 25.]

The Master of the Rolls.[3] The plaintiff, being entitled to an estate called the Rookery, at Woodford in Essex, employed Richard Ellis and son as auctioneers to sell the same by auction in five lots on the 8th day of May, 1834; and the same auctioneers were employed by a Mr. Davies to sell for him an estate at Layton on the same day and at the same place, Garraway's Coffee-House.

The defendant Freeman, who was acquainted with Davies, met Davies on the day preceding the sale, and offered to go and bid for him. Davies having accepted his offer, a meeting between them was appointed to take place at the auctioneer's on the day of sale at twelve o'clock. The object of Davies in appointing this meeting was that the defendant should receive his instructions from the auctioneer; but the defendant, not having kept his appointment, joined Davies at Lloyd's Coffee-House between one and two o'clock, and was in a hurry to proceed to the sale, fearing that he might be too late to bid for Davies's estate. Davies gave him his own instructions, and the defendant hurried away to Garraway's Coffee-House.

The auctioneer's arrangement was to sell the several lots of the

1 The statement of the case is abridged. — Ed.

2 Chute *v.* Quincy, 156 Mass. 189 *Accord.* In this case, the lot sold, viz., lot 23, contained 9230 feet, but by mistake of the surveyor was marked on plan as containing 3230 feet. The price was fixed by the seller at $430.66, being at the rate of thirteen and a half cents per foot. Plaintiff knew that the lot contained more feet than the plan indicated. The court, while refusing to decree specific performance against the seller, dismissed his cross-bill for reformation or cancellation of the contract.

Specific performance was denied in Twining *v.* Neil, 38 N. J. Eq. 470 (approved in Boorum *v.* Tucker, 51 N. J. Eq. 135, 141); in which case the defendant bought at foreclosure sale of a second mortgage in ignorance of a recorded first mortgage. — Ed.

3 Only the judgment of the court is given. — Ed.

plaintiff's estate first, and then to sell Davies's estate, and it appeared that the defendant arrived at the auction room when the second lot of the plaintiff's estate was under sale. He placed himself near enough to the auctioneer for a person not deficient in hearing to hear what the auctioneer said. Lot 2 of the plaintiff's estate was bought in; and the auctioneer, having described lot 3, in terms wholly inapplicable to Davies's estate, offered that lot for sale. The defendant began to bid for it, and kept bidding in a hasty and inconsiderate manner till the price was raised to 1400*l*. The lot was then knocked to him, and the auctioneer declared the property to be absolutely sold. The defendant was not at that moment called upon to sign the contract, but he handed in his card, showing his name as purchaser. About the same time, Mr. Cole, another person employed by Mr. Davies to bid for him, asked the defendant what had induced him to purchase the lot, to which he observed, "Why, it is Davies's property, is it not?" Mr. Cole having told him that it was not, but that he had bought part of Malins's property at Woodford, the defendant seemed much flurried, and said he would speak to the auctioneer. Cole advised him to do so at once, but he said he would wait till the sale was over; and, after the sale was over, being called upon to pay the deposit and sign the contract, he said he had made a great mistake in bidding for lot 3 of the plaintiff's estate, having in fact only intended to bid for Davies, and he refused to sign the contract or pay the deposit.

The auctioneer wrote the defendant's name, as purchaser, on a copy of the conditions and particulars of sale, in such a manner as the plaintiff alleges is sufficient to make the contract binding on the defendant; and therefore he insists that he is entitled to a specific performance of the agreement.

Upon the facts proved, some questions are raised as to the validity of the contract; but supposing the contract to be valid, the defendant submits that he entered into it by error and in mistake, and that he ought not to be compelled specifically to perform it.

Certainly if the defendant did fall into any mistake, it cannot be ascribed to the conduct of the plaintiff. The plaintiff and his agents in no respect contributed to it, and, if the defendant by his carelessness has caused any injury or loss to the plaintiff, he is accountable for it.

But the defendant may be answerable for damages at law without being liable to a specific performance in this court. In cases of specific performance the court exercises a discretion, and, knowing that a party may have such compensation as a jury will award him in the shape of damages for the breach of contract, will not in all cases decree a specific performance; as in cases of intoxication, although the party may not have been drawn into drink by the plaintiff, yet, if the agreement was made in a state of intoxication, the court will not decree a specific performance. And the question here is not, as it has been put, whether the alleged mistake, if true, is

one in respect of which the court will relieve, for the court is not here called upon to relieve the defendant from his legal liability, but whether, if the mistake be proved, the court will enforce a specific performance, leaving the defendant to his legal liability. And I think that, if such a mistake as is here alleged to have happened be made out, a specific performance ought not to be decreed; and after giving to the evidence the best consideration in my power, I am of opinion that the defendant never did intend to bid for this estate. He was hurried and inconsiderate, and when his error was pointed out to him, he was not so prompt as he ought to have been in declaring it. It is probable that by his conduct he occasioned some loss to the plaintiff; for that he is answerable, if the contract was valid, and will be left so, notwithstanding the decision to be now made. But I think that he never meant to enter into this contract, and that it would not be equitable to compel him to perform it, whatever may be the responsibility to which he is left liable at law. Let the bill, therefore, be dismissed without costs.[1]

NATHANIEL B. MANSFIELD *v.* GARDINER SHERMAN.

SUPREME JUDICIAL COURT, MAINE, MARCH 6, 1889.

[81 *Maine Reports*, 365.]

EMERY, J.[2] This is a bill in equity, in which the court is asked to decree the specific performance of a contract for the conveyance of two lots of land, as marked upon a plan.

Such an application is addressed to the sound discretion of the court. Not every party, who would be entitled as of right to damages for the breach of a contract, is entitled to a decree for its specific performance. Before granting such a decree, the court should be satisfied not only of the existence of a valid contract, free from fraud, and enforceable in law, but also of its fairness and its harmony with equity and good conscience. However strong, clear, and emphatic the language of the contract, however plain the right at law, if a specific performance would, for any reason, cause a result, harsh, inequitable, or contrary to good conscience, the court should refuse such a decree and leave the parties to their remedies at law. In an equity proceeding, the complainant must do equity and can obtain only equity. Mortlock *v.* Buller,[3] Willard *v.* Taylor,[4] Snell *v.* Mitchell.[5]

In this case the answer sets up the defence, among others, that the respondent made his offer to sell the land, and named the price under

[1] Alvaney *v.* Kinnaird, 2 Mac. & G. 1, 8 (mistake of defendant's agent); Leslie *v.* Tompson, 9 Hare, 268 (mistake of surveyor of seller's grantor) *Accord.* — ED.

[2] Only the opinion of the court is given. — ED.

[3] 10 Ves. 305. [4] 8 Wall. 557. [5] 65 Maine, 48.

a material mistake, as to the extent and boundaries of one of the lots, — that he did not understand that the lots included a certain valuable building site, which he never intended to sell at such a price — that by reason of such mistake, he named an inadequate price for the lot, and that for the complainant to seek to compel him to convey at that price is inequitable, and is taking an unfair advantage of his mistake.

The facts material to this issue seem to be these: Mr. Sherman, the respondent, living in New York, owned a tract of land in Bar Harbor, which he had caused to be laid out into avenues and building lots, and a plan to be made by a landscape engineer. There were twelve lots, marked on the plan by numbers.

In March, 1887, Mr. Mansfield, the complainant, saw these lots, and inquired of a firm of real estate brokers at Bar Harbor about lot No. 7, a small lot, at the extreme southern end of the tract. The brokers wrote to Mr. Sherman in New York, about this inquiry, and suggested that he authorize them to sell the lots. After some correspondence, Mr. Sherman sent from New York the plan, and a list of prices for the lots, and instructions about selling, the conditions, etc. The scale of prices on this list ranged all the way from $1500 for lot 7, to $10,000 for lot 10. The price of lot No. 12 was marked $2500, — the lowest but two on the list. Lot No. 1 was reserved, and the aggregate price of the eleven lots was $44,000. Mr. Mansfield, after learning the prices and examining the lots, not only said he would take lot No. 7, but said he would take lot No. 12, nearly at the other extremity of the tract, at the price named. Mr. Sherman, on being written to, sent to the brokers, May 25, an offer to sell both the lots at the price of $4000. He subsequently came to Bar Harbor early in June (the 3d or 4th), and went upon the land with the plan, and immediately afterward informed the brokers that he had made a great mistake as to lot No. 12 — that he found it contained a valuable building site, which he supposed was not included, and which he had not intended to bargain at such a price, — and that therefore he could not convey it.

The testimony of all the witnesses, as to the relative value of the lots, is to the effect that lot 12 was one of the most valuable lots in the tract, if, indeed, it was not the most valuable. The real estate agents (called by the complainant) so testified, and also that its value was nearly double that of lot No. 11, marked at $6000. This evidence was not contradicted, and shows that from some cause Mr. Sherman named a very inadequate price for lot 12, in comparison with the other lots. If this was owing to an error in judgment, or a mistaken opinion about the relative values, perhaps the court should not consider it. Mr. Sherman, however, testifies that it was owing to a mistake in material matters of fact; and not to a mistake in judgment. He says there are two building sites within the territory of what is now lot 12, and that he directed the engineer to make two lots of what was lot 12, so as to include in lot 12, as left, only the more north

ern and cheaper building site, and exclude the southern and more valuable site, — that he supposed that his directions were followed, and that he made the offer to sell lot 12 for $2500, under the belief that it did not include the more valuable of the two sites. The engineer corroborates Mr. Sherman. He testifies that he was directed to make such division, but afterward thought it best not to do so, and so put both sites in one lot. It does not appear that Mr. Sherman was ever informed of this departure from his instructions.

It is urged that this story of Mr. Sherman's is not natural, and that he should have seen from the plan itself, when sent him by the engineer, that lot 12 included more than one site, or at least that it had not been divided. Mr. Sherman may have been careless in the matter, and perhaps he should have seen the departure from his instructions, but we can understand how, under the circumstances, he might overlook it and retain the belief that his instructions had been followed. The story explains an evident disparity in price. It is uncontradicted, and it seems to us probable that Mr. Sherman did make the offer under a mistake of fact, as he states.

It should be remembered here that Mr. Mansfield at first only inquired about lot No. 7, — the smallest lot, and situated at the extreme southern end of the tract. It was not till after he saw the list of prices that he desired to include in his purchase lot 12, near the extreme northern end of the tract. The two lots are far apart, and have no possible connection with each other. It seems probable that Mr. Mansfield saw the disproportion of price as to lot 12, and for that reason endeavored to secure it.

Would it be equitable and in accord with good conscience to compel a conveyance under such circumstances? Do equity and good conscience require that Mr. Mansfield should gain and Mr. Sherman lose by this mistake? The equitable principle involved can perhaps be more vividly illustrated by stating a case similar in kind, but stronger in degree. Suppose Mr. Sherman had built a costly residence on lot 12, and yet, living in New York, he in some way had the impression that the structures were on lot 11, and that lot 12 was an unimproved lot, and under such actual impression had bargained lot 12 at a correspondingly low price to one who knew that the buildings were on lot 12. Would it be fair or honorable in the vendee, after being apprised of the vendor's mistake, to insist on a conveyance at such an inadequate price? Would not such a vendee justly be thought a hard, rigorous man, and the rule of law that sustained him justly be thought a harsh, inequitable rule?

Mr. Sherman, living at a distance, remembering the particular building site, which he thought so valuable, had somehow acquired the erroneous impression that it was not included in lot No. 12. It was a mistake of fact, and about an important and controlling fact. Mr. Mansfield must have been aware from the evident disparity that there was very likely some mistake about it.

Of course, if there was a valid contract, Mr. Sherman should an-

swer in damages for all the loss his mistake and refusal to convey have occasioned Mr. Mansfield. The court, when appealed to in an action at law, can only consider whether there was a valid contract and a breach. The mere mistake of one party, however great, will not excuse him from making full compensation. When, however, application is made to the court, not to determine and enforce legal rights, but "to do equity" between the parties, the court will be careful to do only equity, and will not aid one party to take advantage of the mistake of the other party. We think in this case we should decline to decree a specific performance, and should leave the parties to their rights and remedies at law. It does not appear that pecuniary damages for the breach would not fully compensate Mr. Mansfield for all losses he has sustained in the matter.

A few cases will illustrate the principle that a mistake of one party will justify a court of equity in refusing to decree a specific performance against him.[1]

In this case, were it clear that there is a contract binding at law, we should think it equitable for the respondent to pay the costs of this proceeding, which would then be defeated by his own mistake; but as there is some doubt about the validity of the alleged contract, we think it more equitable to leave each party to bear his own costs.

Bill dismissed.

TAMPLIN *v.* JAMES.

Court of Appeal, July 13, 1880.

[*Law Reports*, 15 *Chancery Division*, 215.]

This was an action by vendors for specific performance.

On the 25th of July the plaintiffs, who were the trustees of a will, put up certain parts of their testator's property for sale in lots. Lot 1 was described as follows: —

"All that well-accustomed inn, with the brewhouse, outbuildings, and premises known as The Ship, together with the messuage, saddler's shop, and premises adjoining thereto, situate at Newerne, in the same parish, No. 454 and 455 on the said tithe map, and containing by admeasurement twenty perches, more or less, now in the occupation of Mrs. Knowles and Mr. S. Merrick.

"This lot is situate close to the Lydney Town station, on the Severn and Wye Railway, and abuts on other premises of the vendors, on the canal, and on lands now or late of the Rev. W. H. Bathurst."

Lot 1 was not sold at the auction, but immediately afterwards the defendant, who had been present at the auction, made an offer for it

[1] The court here stated the facts and decisions in Leslie *v.* Thompson, 9 Hare, 268; Alvanley *v.* Kinnaird, 2 Mac. & G. 1; Malins *v.* Freeman, 2 Keen, 25; Webster *v.* Cecil, 30 Beav. 62; Baxendale *v.* Seale, 19 Beav. 601; and Buckhalter *v.* Jones, 32 Kan. 5. — Ed.

which was accepted, and signed a contract for purchase according to the conditions of sale at the price of £750.

At the back of Lot 1, and of the house adjoining it, lay three plots of garden ground, which had formerly belonged to the Rev. W. H. Bathurst, but had since been purchased by the railway company. One of these pieces of ground was in the occupation of the tenant of the messuage and saddler's shop, and the other in the occupation of the tenant of The Ship Inn. The tenants each held his house and the garden ground at one rent, which was paid to the vendors' agent, who accounted to the owners of the garden ground for their proportions of the rent. The origin of this arrangement, which had been acted upon for many years, did not appear. The rent paid for the gardens was 10*s.* a year each. Each of these two pieces, which together contained about twenty perches, was partially divided by a fence from the premises with which it was occupied, but there was no boundary of such a nature as to suggest that it belonged to a different owner.

It appeared that at the auction two plans of Lot 1 were lying on the table, and the auctioneer called the attention of the persons present to them. One of them was a tracing from the tithe map, the other was a tracing on a much larger scale from a map belonging to the railway company. On this latter plan the pieces of garden ground were marked as belonging to the railway company, and in each plan the property forming Lot 1 was colored, so as to distinguish it from the adjoining property. It was correctly described as being 454 and 455 on the tithe map, and included the whole of the closes so numbered.

The defendant deposed that he had not seen the plans, and was not aware of there being any plans in the room; that he had known the property from a boy, and knew that the two plots of garden ground had all along been occupied with The Ship Inn and the saddler's shop respectively; and that he bought in the full belief that he was buying all that was in the occupation of the tenants, and he declined to complete unless the gardens were conveyed to him.

In consequence of the illness of the Vice-Chancellor Malins, the hearing took place before Lord Justice Baggallay, who gave a decree for specific performance.[1]

James, L. J. In my opinion, the order under appeal is right. The vendors did nothing tending to mislead. In the particulars of sale they described the property as consisting of Nos. 454 and 455 on the tithe map, and this was quite correct. The purchaser says that the tithe map is on so small a scale as not to give sufficient information, but he never looked at it. He must be presumed to have looked at it, and at the particulars of sale. He says he knew the property, and was aware that the gardens were held with the other property in the occupation of the tenants, and he came to the conclusion that what was offered for sale was the whole of what was in the occupation of

[1] The judgment of Baggallay, L. J., the arguments of counsel before the Court of Appeal, and the concurring judgment of Cotton, L. J., are omitted. — Ed.

the tenants, but he asked no question about it. If a man will not take reasonable care to ascertain what he is buying, he must take the consequences. The defence on the ground of mistake cannot be sustained. It is not enough for a purchaser to swear, "I thought the farm sold contained twelve fields which I knew, and I find it does not include them all," or, "I thought it contained 100 acres and it only contains eighty." It would open the door to fraud if such a defence was to be allowed. Perhaps some of the cases on this subject go too far, but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain, and it was unreasonable to hold him to it. Webster *v.* Cecil is a good instance of that, being a case where a person snapped at an offer which he must have perfectly well known to be made by mistake; and the only fault I find with the case is that, in my opinion, the bill ought to have been dismissed with costs. It is said that it is hard to hold a man to a bargain entered into under a mistake, but we must consider the hardship on the other side. Here are trustees realizing their testator's estate, and the reckless conduct of the defendant may have prevented their selling to somebody else. If a man makes a mistake of this kind without any reasonable excuse, he ought to be held to his bargain.[1]

Brett, L. J. It would be dangerous to attempt an exhaustive definition of the cases in which the court will refuse specific performance. The jurisdiction is a delicate one, and the more so since the fusion of law and equity; for if the court refuses specific performance it must now, in my opinion, consider the question of damages. Here the property was put up for sale by a description which could not mislead anybody who took reasonable care, for it is defined by reference to the numbers on the tithe map, what follows being only a further description of what is included in the two specified closes on the tithe map. According to the finding of Lord Justice Baggallay the defendant bought under a mistake, but it was a mistake into which he was led solely by his not taking reasonable care. The defendant therefore has to support the proposition that although there is nothing misleading in the particulars, and his mistake was not on a point of vital importance, and arose entirely from his own negligence, he is to be relieved.

1 Goddard *v.* Jeffreys, 51 L. J. Ch. 57; Stewart *v.* Kennedy, 15 App. Cas. 75, 105; Dyas *v.* Stafford, L. R. 7 Ir. 590, 606; Dewey *v.* Whitney, 97 Fed. R. 533; Caldwell *v.* Depew, 40 Minn. 528 *Accord.*

In Goddard *v.* Jeffreys, *supra*, Kay, J., said: "I understand the rule to be this: The purchaser may escape from his bargain on the ground of mistake, if it was a mistake which the vendors contributed to — that is, in other words, if he was misled by any act of the vendors; but if he was not misled by any act of the vendors — if the mistake was entirely his own — then the court ought not to let him off his bargain on the ground of a mistake made by himself solely, unless the case is one of considerable harshness and hardship"

An immaterial, unilateral mistake is no bar to a suit for specific performance. Davis *v.* Parker, 14 All. 94. Nor is a promisor's disappointment as to the outcome of his contract a reason for not enforcing its performance. Mosley *v.* Clavering, 29 Beav. 949; Western Corp. *v.* Babcock, 6 Met. 346. — Ed.

I think that such a proposition cannot be maintained. In Webster *v.* Cecil the purchaser was acting fraudulently in seeking to take advantage of what he knew to be a mistake.

James, L. J. I also am of opinion that where an action is brought for specific performance, and specific performance is refused on the sole ground of a mistake by the defendant, the court ought to give the same damages as would, under the old practice, have been given in an action at law.

POWELL *v.* SMITH

In Chancery, before Lord Romilly, M. R., April 26, 1872.

[*Law Reports*, 14 *Equity*, 85.]

This was a suit for the specific performance of an agreement to grant a lease of a farm.

The agreement was made in September, 1870, between the plaintiff William Powell and T. H. England, who acted as agent for the defendant, E. M. Smith. The controversy grew out of the following stipulation in the agreement: "Lease to be for 7, 14 or —— years from the 29th of September, 1870."

The plaintiff was let into possession of the farm, paid 616*l.* on account of the tenant right, and had laid out large sums in the improvement of the farm.

The defendant, however, refused to grant him a lease for more than seven years without inserting a power for the landlord to determine the same at the end of seven years. He insisted that England's authority was limited to the making, in his behalf, of an agreement to grant to the plaintiff a lease for a period determinable at the option of either party at the end of seven or fourteen years; and that such was the true construction of the agreement actually made.

It appeared from the evidence that the defendant had an estate of about 3000 acres, and that all his leases to other tenants were determinable at the end of seven years, at the option of either party. The plaintiff, however, deposed that he was not aware at the time of the agreement of any such provision being inserted in the other leases granted by the defendant, and that he signed the agreement with the full understanding and belief that the lease would only be determinable by himself.[1]

Lord Romilly, M. R. I am of opinion that this is not properly a case of mistake at all. In those cases in which agreements have been set aside on the ground of mistake, there has been a mistake as to the agreement which has been entered into. That is not the case here, for the words of the agreement are not disputed on either side; nay, more, shortly after the agreement was entered into, it was so far

1 The statement of the case is condensed and the arguments of counsel are omitted. — Ed.

ratified that under it the plaintiff was actually put into possession of the farm. All those cases which have been cited during the argument are cases where there was either a dispute and doubt as to the thing sold, or where the words of the agreement expressed certain things in an ambiguous manner, which might be understood by one of the parties. In all those cases the court has held that it must look at the evidence, and that if the mistake is sufficiently proved the court will then set aside the agreement. But here the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain words which it contained. Now that is no ground of mistake at all. It is a question upon the construction of an agreement agreed to by everybody concerned.

The construction of the agreement is unquestionable. When it says, "for seven or fourteen years," those words allow the lessee to have an option of saying whether he will give it up at the end of the seven years. Upon that there is no question whatever. Therefore it is not, as was stated here, a mistake as to the contract which was entered into, but that a person entered into an agreement, the legal effect of which he did not know at the time. But the legal effect of a contract upon the true construction of the words, is a matter by which he is bound. Here the defendant has acted upon this agreement. He was aware that the plaintiff took possession of the farm a few days afterwards, and paid the outgoing tenant for the stock on the farm.

If it could be proved that the plaintiff knew that the defendant never granted leases in which he did not reserve the option of determining the leases to himself as well as to his lessees, according to the form adopted by some large landed proprietors, then another ingredient might arise, namely, that of fraud in taking advantage of that which, though it was understood by him, was not stated. But the plaintiff says in effect, "Here is the agreement, and all I come to you for is to execute a lease in conformity with the agreement;" and then the defendant says, "I did not mean the agreement to have its legal effect." Could he have alleged that the agreement was not binding on him, so that he was not bound to execute a lease in conformity with it? It is clear from the authorities cited by Mr. Phear that where the court sees there can be no mistake, it will not, on such a ground as here alleged, set aside the contract or interfere to prevent its specific performance.[1]

Besides, in the cases referred to, one important ingredient in considering whether the court will set aside a contract has been this — Can the parties be put in the same position in which they were before? In the present case that cannot be done, for the plaintiff cannot be put in the same situation now as if the agreement had been carried into effect for a lease of the farm two years ago. In all these cases time is of the essence of the contract. Moreover, this is not a case in which the plaintiff should be left to his remedy at law,

[1] Hart v. Hart, 18 Ch. D. 670; Hawralty v. Warren, 18 N. J. Eq. 124 *Accord.* — Ed.

40 Minn 528 ; 9 Manitoba Rep. 444.

for it is the object of suits in this court to make the decision final, and it would be difficult to ascertain the extent of the particular damage which the plaintiff has sustained, or what he might have obtained elsewhere if he had not entered into this contract.

Here the defendant by his agent has adopted a certain form of agreement, and then when he finds out that it gives certain rights which he did not intend, he wishes to put an end to it. But this court considers that every one entering into such a contract is bound to know what the law is, and as the defendant entered into it with his eyes open (assuming that he is bound by the acts of his agent) he cannot set it aside because he finds the construction of it is against him.

I am quite clear also that the defendant has assented to Mr. England's contract, and that his acts have put the plaintiff into possession. The result is that the plaintiff is entitled to a decree, and to have a lease for seven or fourteen years, determinable at his option at the end of seven years.

T. SULLIVAN *v.* ELLA C. JENNINGS AND OTHERS.

IN CHANCERY, NEW JERSEY, BEFORE A. C. McGILL, C., FEBRUARY TERM, 1888.

[44 *New Jersey Equity Reports*, 11.]

THE CHANCELLOR. The defendant, Ella C. Jennings, owned a tract of land in Essex county which was subject, first, to a mortgage for $1800, held by a physician, David C. Smith, and, second, to a mortgage for $2000, held by the complainants, and then to two judgments for amounts aggregating $400.

Upon the land there was a greenhouse, a windmill, and a water-tank house, upon which the complainants held, and yet hold, a chattel mortgage for $1050.

The complainants filed their bill to foreclose their mortgage for $2000. They made the holders of the judgments and the owner of the land and her husband parties to the suit. Dr. Smith was not made a party, and no reference was made to the chattel mortgage.

The mortgaged premises were sold in pursuance of the decree in the suit, subject to Dr. Smith's mortgage and to whatever claim the complainants may have under their chattel mortgage.

At the time of the sale, Dr. Smith had but little knowledge of legal matters, and was so self-reliant that he failed to take legal advice, and concluded to bid at the sale for the purpose, as he thought, of protecting his mortgage. As the sale was postponed from time to time, and he could not spare sufficient time to attend upon it, he authorized the under-sheriff, who had the sale in charge, to bid for the property, in his name, an amount not exceeding $2500. He had

calculated that that sum would pay the expenses of the sale and protect his mortgage. The property was struck down to him for $2350.

The sum bid will not quite satisfy the decree of the complainants, and Dr. Smith, if he shall be held to his bid, must pay nearly $4500 for land which is proved to be worth about $1000 less than that sum, and to take it either without the greenhouse, windmill, and tank-house, which are covered by the chattel mortgage, or contest the lien of that mortgage, or satisfy it.

The complainants seek to take advantage of the mistake that Dr. Smith so carelessly made, and claim that it is a mistake of well-settled law against which this court will not relieve.

I fail to perceive any ground upon which I could relieve Dr. Smith from his bid, if he were the applicant before me. To use the words of the Vice-Chancellor, in Hayes *v.* Stiger,[1] "A purchaser at a judicial sale who voluntarily abstains from all effort to get correct information, and deliberately assumes the hazard of making a purchase ignorantly, must, as a general rule, bear the consequences of his own negligence." But the complainants are the applicants. They did not make Dr. Smith a party to their foreclosure. They are the holders of the chattel mortgage against which the Doctor must contend, and they ask that he may be compelled to pay more for the property than it is worth, not because of any equity in their favor, but because he has placed himself under legal obligation to pay it, and because the payment will redound to their advantage.

The specific performance of an agreement rests in the sound discretion of the court. It is a matter of favor, not of right. To secure the court's favor the agreement should be just, equal, and agreeable to good conscience, and not a catching bargain. The contract here is not such an agreement, it is not conscionable, and should not be enforced in a court of equity. Crane *v.* DeCamp.[2]

When Dr. Smith made his bid he did not design to trifle with the court. I am satisfied that he intended in good faith to bid for the protection of his own interests, and that he now withholds the amount of his bid solely to obtain relief, if possible, from the consequences of his error. So far then as the element of contempt, in the Doctor's attitude, is concerned, I fail to see that it is deserving of such punishment as the granting of this application will inflict.

The parties should be left to their remedy and defence at law. I am guided to this conclusion by the action of the Vice-Chancellor in Twining *v.* Neil.[3]

The order to show cause will be discharged, and the application denied, but without costs.[4]

[1] 2 Stew. Eq. 196, 198. [2] 6 C. E. Gr. 414. [3] 11 Stew. Eq. 470.

[4] In Watson *v.* Marston, 4 D. M. & G. 230, a mortgagee having a power of sale, after a decree of foreclosure contracted to sell the property under the power of sale, not knowing that a sale in that manner might reopen the foreclosure and make him accountable to the mortgagor for any surplus. The court refused to enforce performance of the contract to sell under the power.

MUTUAL MISTAKE. — Mutual mistake, being a sufficient reason for a reformation or

THE EARL OF DURHAM *v.* SIR FRANCIS LEGARD.

IN CHANCERY, BEFORE SIR JOHN ROMILLY, M. R., JULY 14, 1865.

[34 *Beavan*, 611.]

IN 1862, the plaintiff agreed to purchase an estate of the defendant for 66,000*l*. It was described, in the written contract, as the "Kidland Estate containing 21,750 acres."

In the course of the investigation of the title, it turned out that the Kidland Estate contained no more than 11,814 acres.

In May, 1863, the purchaser instituted this suit for the specific performance of the contract, on payment "of the purchase money, less a proper compensation for the deficiency in quantity." The defendant was willing either to perform the contract on receiving the full price stipulated or to cancel the contract.

The plaintiff stated, in his affidavit, that he purchased the estate under the impression that its contents was 22,000 acres or thereabouts, that he would not have purchased if the real area had been stated, and that he had been guided in the price given by the extent of the estate and not by the rental, especially as he regarded it as affording him shooting and fishing over a large area.

On the other hand, on the part of the defendant, it was shown that the representation of the quantity was a *bona fide* mistake of his agent, and the defendant said that "throughout his negotiation, he was, in determining the value of and fixing the price he should ask for the estate, actuated solely by the consideration of the rental thereof, and upon which alone he had made his calculations."[1]

THE MASTER OF THE ROLLS. I am of opinion that this is not a case for compensation at all; it is quite distinct from that; it is a case of mistake, and not a case for compensation.

The court, it is true, exercises a discretion in cases of specific performance; but it is laid down in White *v.* Damon,[2] and in many other cases, that the discretion in giving specific performance is "not an arbitrary capricious discretion, but must be regulated upon grounds

rescission of a contract, is *a fortiori* a bar to a specific performance of it. Accordingly specific performance was denied in the following cases in which the written contract through a mistake in its drafting did not express the actual agreement of the parties. Joynes *v.* Statham, 3 Atk. 387; Clarke *v.* Grant, 14 Ves. 519; Ramsbottom *v.* Gordon, 1 V. & B. 165; Clowes *v.* Higginson, 1 V. & B. 524; Martin *v.* Pycroft, 2 D. M. & G. 785; Smith *v.* Wheatcroft, 9 Ch. D. 223; McCormick *v.* Stephens, 57 N. J. Eq. 257; Mathews *v.* Terwilliger, 3 Barb. 50. Similarly, specific performance is denied, if the contract, though expressed in the form intended, was entered into upon a mutual but erroneous assumption of the existence of a certain fact. Baxendale *v.* Seale, 19 Beav. 601 (mistake as to quantity of *res*); Cochrane *v.* Willis, 1 Ch. Ap. 58 (sale of *res* already belonging to the buyer); Davis *v.* Shepherd, 1 Ch. Ap. 410 (mistake as to quantity of *res* sold); Jones *v.* Clifford, 3 Ch. D. 779 (sale of *res* already belonging to buyer); Patterson *v.* Bloomer, 35 Conn. 57 (mistake as to law of foreign state); Schmidt *v.* Livingston, 3 Edw. 213 (mistake as to quantity of *res*); Leigh *v* Crump, 1 Ired. Eq. 299 (mistake as to quantity of *res* sold). — ED.

[1] The argument for the plaintiff is omitted. — ED.

[2] 7 Ves. 30.

that will make it judicial." I admit that the general rule is, that where there is a deficiency in quantity, such deficiency is properly the subject of compensation; but that rule must be confined within certain limits Where a person sells 21,000 acres, and finds that he has only 11,000 to sell, or, in point of fact, little more than half of what he has disposed of, that, in my opinion, is not a case for compensation, nor do I know how the court could deal with it as a case of compensation. In all these cases, where the court has found that it is utterly impossible to deal with the case as one for compensation, it has said, "This is not a case for compensation, but one for avoiding the contract." For instance, if a man sells freehold land, and it turns out to be copyhold, that is not a case for compensation; so if it turns out to be long leasehold, that is not a case for compensation; so if one sells property to another who is particularly anxious to have the right of sporting over it, and it turns out that he cannot have the right of sporting, because it belongs to somebody else, I apprehend it is not a case in which the court can ascertain what should be the amount of compensation to be given. In all those cases the court simply says it will avoid the contract, and it will not allow either party to enforce it, unless the person who is prejudiced by the error be willing to perform the contract without compensation.

In Price *v.* North,[1] what was sold was "seven fields, 14 acres more or less." By one of the conditions of sale, any mistake or error in the description was to be the subject of compensation. It turned out that there were 27 acres, and the vendor said, "This is not to annul the sale, but is to be made the subject of compensation, and I am entitled to an additional price." But the court said, "that such a misdescription as this would not be the ground for modifying the contract, but for avoiding the sale altogether." So, in this case, a person buys one half the quantity of land that he intended to buy, and the vendor intended to sell. The result is, that there has been a mistake between the parties, and I am of opinion that this is not a case in which the court could, upon any principle, assess compensation so as to make everything fair between them.

In the case of Hill *v.* Buckley,[2] which is usually cited upon these occasions, Sir William Grant laid it down that when the land turns out to be less than it is represented to be, the ordinary mode of calculating the compensation is, to ascertain the quantity, and allow for the deficiency. But if that principle were followed here, the plaintiff would get for less than 36,000*l.* an estate the rental of which was accurately stated and which the defendant intended to sell for 66,000*l.* It is, therefore, clear I should be doing great injustice if I applied that rule upon the present occasion.

I am of opinion that this is simply a case of mistake, and that the purchaser is not entitled to any compensation. He may elect to perform the contract without compensation, but, considering the defendant's offer before suit, the plaintiff must pay the costs of suit down to the present time.

[1] 2 Young & C. (Ex.) 620.

[2] 17 Ves. 394.

SECTION XI.

Hardship or Unfairness.

FAINE *v.* BROWN.

In Chancery, before Lord Hardwicke, C., December 12, 1750.

[2 *Vesey, Senior*, 307, *cited*.]

A man was entitled to a small estate under his father's will, given on condition that if he should sell it in twenty-five years, half the purchase money should go to the brother: he agreed in writing to sell it; and afterward refused to carry it into execution, pretending to have been intoxicated with liquor at the time. A bill was brought to compel it.

Your Lordship [Lord Hardwicke] said that without the other circumstance, that hardship alone of losing half the purchase money, if carried into execution, was sufficient to determine the discretion of the court not to interfere, but leave them at law.[1]

ADAMS *v.* WEARE.

In Chancery, before Lord Thurlow, C., May 11, 1784.

[1 *Brown, Chancery Cases*, 567.]

Bill, brought by the vendor against the vendee, for a specific performance of an agreement.

The contract was a memorandum, signed only by the defendant, to the following purport: that the vendee agreed to buy of the vendor the premises in question, provided he would convey them to him, and make a good title thereto. The vendor took a guinea of the vendee, by way of earnest.

The late Master of the Rolls had decreed for the plaintiff.[2]

Lord Chancellor. It is very material in this case to attend to facts. I am not very anxious to discuss the point, what bargains the

[1] Equity will not decree specific performance if the contract cannot be performed without involving a forfeiture by the defendant. Peacock *v.* Penson, 11 Beav. 355; Lasar *v.* Baldridge, 32 Mo. Ap. 362; Henderson *v.* Hays, 2 Watts, 148, 151.

But if the defendant might have performed the agreement without a forfeiture but for some act of his own subsequent to the making of the contract, he cannot resist the claim for specific performance. Helling *v.* Lumley, 3 De G. & J. 493. — Ed.

[2] The statement is abridged and the arguments are omitted. — Ed.

court will execute or not; but when the court has laid it down as an article of the equity which men shall obtain here, and which they cannot obtain at law, that instead of damages they shall have a specific performance; and that every agreement must be performed, unless something at the time of making the bargain or something done since is to amount to a waiver of it at the time of carrying it into execution; if you do not confine yourself within that limit, there are no bounds whatsoever: for rules ought to be fixed, and it would be calamitous that the matter should rest upon such loose expressions as hard and unconscionable; which expressions, unless they are properly applied, mean little or nothing. This bargain, if impeached, must be so at the time of its commencement; for nothing has happened since to impeach it, unless that the party has failed in his speculation in respect to a bargain which he made with his eyes perfectly open. It is perfectly necessary to see what were the real terms of the bargain. On the 11th of March, overtures were made concerning the purchase of these lands by Weare. 800*l.* was demanded as the price for the estate, putting that value upon it in contemplation of building the mill, and other articles of no moment now, unless the erection of the mill was the real ground upon which the price was carried to the extent it was. It was insisted it cannot be carried into execution because it is proved that the price was upwards of three-fourths more than the value; but, for what I know to the contrary, it may be the value. After the 11th of March no answer was given to that letter; but Weare, in order to get a farther treaty, applied to a Mrs. A., as a relation of the family, to go with him and take Adams aside, and ask him in privity the lowest price he would take; which she did, and he made the same demand as before: and some days afterwards, Weare went again to Adams with Mrs. A. to treat with him. As to the objection that this is the evidence of relations, I think it is fair and unimpeachable evidence. They went to Adams before dinner, and conversation was had in regard to the improvement by building a mill, which is beyond doubt; and the price was reduced to 740*l.* Mr. Weare agreed to give the price and to build the mill if he could get the consent of the corporation; and the single suggestion mentioned was the consent of the corporation. Mr. Adams said, I will have no If; it shall not be conditional; the business shall be all yours to get that consent. Weare was an alderman of the corporation, and he had interest; but Adams had none. The price was settled upon an express acceptance of the estate; and Adams would have nothing to do with any conditional bargain, as to obtaining the consent of the corporation. After dinner the agreement was made out; and it is suggested that it was intended as a conditional bargain, though the evidence has proved the contrary, and the agreement is written without expressing anything upon the application. Adams was the person to draw the agreement; and he observed, we must be upon honor, and no advantage to be taken of the condition. It is impossible, if that conversation had related to such a condition, he should not mention it

in the writing. He knew himself to be incapable of executing any such condition, and therefore the conversation related to the mere form of drawing out the writing. Thus the matter rested till the 22d of March, when Weare wrote to Adams, to inform him that he had written to Mrs. Day (tenant to the corporation), to whom the erection of the mill would have been injurious, and as her consent could not be obtained, the bargain was off. It struck me strange that he should confine himself to Mrs. Day, and say nothing of the corporation; but the evidence says that he was informed by him that he had made this bargain and proposed purchasing lands on the other side of the river, with her consent; but that was not made one of the terms, because he thought himself sure of her consent. When I consider the evidence, and upon what consideration this consent was to be had, I am sure he made no doubt of obtaining it; but the surveyor said it would be of prejudice to Mrs. Day, when the consent was denied him. The question is, what he has done to obtain the consent of the corporation; could he or could he not have obtained Mrs. Day's consent, if he had offered her a premium for any imaginary damages that would have arisen to her by his building the mill? The burden lay upon Weare to obtain that consent; it was his part to have done so; but there is no evidence of accommodation on his side as to that point, for it only says he applied to Mrs. Day and she refused her consent, but nothing is mentioned as to a premium being offered by him. Suppose he had obtained her consent, and the corporation had been mentioned; when it was an express part of the case that the owner should not have been answerable, there appears rather to be fraud on the part of the defendant, for he had no authority to think so. It has been said, stating the answer given to that letter by Adams, that there is something in it, because he does not expressly deny that he could not obtain the consent. In reply, he only insists upon the agreement, but does not charge it in the manner it is done on the other side. It does not appear how this consent may be obtained, for if he can obtain it the agreement may still be executed. It does not appear to me what the value of the premises would be if applied to the purpose of working the mill. What the advantage of it might be is not stated; therefore I think that, without entering into the particulars of the case, the Master of the Rolls has done right, for no case can be cited where parties have made a bargain with their eyes perfectly open and no surprise whatsoever, as in this case, in which the court has refused to decree a specific performance. Here is no mistake of the object, as in Hick *v.* Philips;[1] and as to the greatness of the price, Adams had a right to ask a large sum, and the other had agreed to give it, with a view to the intended purpose of erecting and working his mill; for he went upon the notion of that, that he was sure of Mrs Day's consent, and if so, of that of the corporation.

Decree affirmed.[2]

1 Prec. Ch. 575.

2 The mere fact that the defendant made a losing bargain is not a sufficient reason for re-

WEDGWOOD *v.* ADAMS.

IN CHANCERY, BEFORE LORD LANGDALE, M. R., NOVEMBER 24, 1843.

[6 *Beavan*, 600.]

THE MASTER OF THE ROLLS.[1] The question is simply this, whether the trustees who entered into this contract are personally liable to exonerate the purchased estate from the incumbrances which affect it, and whether they are to be compelled specifically to perform the contract which they have entered into.

The first question argued is as to the meaning of the contract. It appears that Ann Parry and W. E. Parry, the owners of the estate in question, were indebted apparently to a large amount, and they conveyed the estate to three trustees, in order that it might be sold. The contract was entered into by the three trustees and by the two persons beneficially interested in the estate. The duties to be performed by the trustees and the beneficial owners were, as in all ordinary cases, very distinct. The trustees were to perform the duties belonging to their trust, and the beneficial owners were to perform every duty attached to the property. This being the situation of the parties, it is, in the commencement of the contract, carefully stated that the three trustees were trustees of the estates of the other parties to the contract, and it is also expressly stated that they entered into the contract as trustees. In the course, however, of the same contract, the trustees and the beneficial owners are joined together in the same agreement, that is, they all agree, without any distinction, that there shall be a clear title made out at their expense, that the estate shall be conveyed or surrendered free from incumbrance, and that there shall be covenants for quiet enjoyment, and so on; and then follows another and distinct agreement, that if there shall be any incumbrance on the property it shall be exonerated by the five persons named, viz., by the trustees and the beneficial owners, and that the estate shall be vested in them prior to the conveyance.

lieving him from specific performance. Haywood *v.* Cope, 25 Beav. 140; Morley *v.* Clavering, 29 Beav. 84; Franklin Co. *v.* Harrison, 145 U. S. 459; Schmidt *v.* Louisville Co., 101 Ky. 441; Whitted *v.* Fuquay, 127 N. Ca. 68; Clark *v.* Hutzler, 96 Va. 73; Southern Co. *v.* Franklin Co., 96 Va. 694; Young *v.* Wright, 4 Wis. 144.

Nor can a buyer resist performance on the ground of hardship if his determination to outbid others at an auction has led him to bid an extravagant price. Coote *v.* Coote, 1 Sau. & Scull. 693.

A contract by a railroad company to purchase land for a projected track continues enforceable specifically although the proposed route has been abandoned. Hawkes *v.* Eastern Co., 5 H. L. C. 331, 350–353, 355, 365, 379; 1 D. M. & G. 737, 755–759 (explaining Stuart *v.* London Co., 1 D. M. & G. 721, and Webb *v.* Direct Co., 1 D. M. & G. 521).

Specific performance will be enforced against a buyer although he bought, in fact, for another as a principal. Chadwick *v.* Maden, 9 Hare, 188; Saxon *v.* Blake, 29 Beav. 438.

The insolvency of a buyer is no bar to his bill for specific performance, if his obligation to pay for improvements made by the seller will not mature for some years after the time fixed for conveyance. Thompson *v.* Winter, 42 Minn. 121. —ED.

[1] The statement of the case, the arguments of counsel, and a small part of the judgment are omitted. — ED.

On the construction of the contract, I am inclined to think that its effect is to create a personal obligation in the trustees, but I can hardly believe that this effect could have been known to the parties at the time. It is to me extraordinary that trustees who had no interest whatever in the matter should knowingly enter into a personal obligation to exonerate the trust estate from every incumbrance that might affect it. It seems to me equally extraordinary that a purchaser who intended to rely on the personal liability of the trustees should not have taken care to have that distinctly stated, and to distinguish the trustees from the persons beneficially interested, and not confound them in the same agreement, as seems to have been done here.

I conceive this to be an ill-drawn contract: the effect may, however, be that contended for by the plaintiff. Suppose it to be so, the question then arises, whether, under the circumstances, it is a fit contract to be specifically performed.

Now I would rather, before I decide that question, look at the cases which have been cited on the subject; but with reference to the last argument used, viz., the difficulty of determining what sum would be unreasonable to compel the trustees to pay, and at what amount the court would stop, I conceive the doctrine of the court to be this, that the court exercises a discretion, in cases of specific performance, and directs a specific performance unless it should be what is called highly unreasonable to do so. What is more or less reasonable is not a thing that you can define; it must depend on the circumstances of each particular case. The court, therefore, must always have regard to the circumstances of each case, and see whether it is reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance, knowing at the time that if it abstains from so doing, a measure of damages may be found and awarded in another court. Though you cannot define what may be considered unreasonable, by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages.

There would be great inconvenience either way in this case. By this contract, Colonel Wedgwood was to have possession of the estate five years ago. He has had possession, and certainly cannot now be deprived of the benefit of this contract without very great inconvenience. On the other hand, if these defendants are called on to perform the contract in the way here asked, what means have I of measuring the inconvenience to which they will be subject? I have statements on both sides as to the accounts and charges, but I can form no opinion whatever as to what may be the result from the master's report, on which I find it in great controversy between the parties whether the whole purchase money of the estate will or will not discharge the incumbrances. I must, therefore, look at it in this light, that it may not be sufficient; and if so, I have no measure of the extent to which the purchase money may be deficient. It may be 200*l.*, 300*l.*, or 500*l.*, and, for anything I know, it may be 5000*l.*

I will not decide the question at this moment, as I wish to look at the cases: I will mention it again.

In this case, I have looked over the papers, and I think that the contract is not at all less extraordinary than the trust deed, which is a deed for the payment of every sort of claim before even the costs and expenses of the deed.

However, after consideration, I think I cannot order a specific performance of that agreement; and with regard to its being a mere money objection, I could not, when this case was argued, call distinctly to my mind a case of that sort, of which I had some recollection, and which came before Lord Hardwicke. It is a case not actually reported, but it is cited in the argument.[1] There, a person being entitled to a small estate under the will of his father, on condition that if he sold it within twenty-five years, half the purchase money should go to his brother, sold it within the time, and the question was whether that agreement should be specifically performed; Lord Hardwicke thought not, because, by the specific performance of it, he would lose half the purchase money. I think that came very nearly to a case of mere pecuniary objection.

I cannot decree a specific performance, and it is for the plaintiff therefore to consider what he will do.[2]

J. W. KELLEY *v.* YORK CLIFFS IMPROVEMENT CO.

SUPREME JUDICIAL COURT, MAINE, NOVEMBER 23, 1900.

[94 *Maine Reports*, 374.]

EMERY, J.[3] This is a bill in equity in which the court is asked to decree the specific performance of an alleged contract for the conveyance of two parcels of land at York Cliffs. As to such applications generally, it seems advisable to iterate and affirm what was said by this court in Mansfield *v.* Sherman, viz: "Such an application is addressed to the sound discretion of the court. Not every party who would be entitled as of right to damages for the breach of a contract is entitled to a decree for its specific performance. Before granting such a decree, the court should be satisfied not only of the existence of a valid contract, free from fraud, and enforceable in law, but also of its fairness and its harmony with equity and good conscience. However strong, clear and emphatic the language of the contract, however plain the right at law, if a specific performance would, for any reason,

[1] In Ramsden *v.* Hylton, 2 Ves. sen. p. 307.

[2] The bill was afterwards dismissed, without costs. See 8 Beav. 103.

[3] Only the opinion of the court is given. — ED.

cause a result, harsh, inequitable or contrary to good conscience, the court should refuse such a decree and leave the parties to their remedies at law. In an equity proceeding, the complainant must do equity and can obtain only equity."

From the evidence in this case we find the following facts: The York Cliffs Improvement Company was organized in 1892 to purchase, improve, lease and sell lands at York Cliffs, a summer resort. It purchased some 400 acres of land, laid it out into lots, built a hotel and made other improvements. It incurred some debts, but did not sell much land and was not a financial success. In August, 1898, the plaintiff, in behalf of a client who did not wish his name to be known, approached the president and some of the directors of the company with a view to purchase the two parcels in question. After some negotiation the bond of the company in the sum of $15,000, was given to the plaintiff for the conveyance of the land to him on or before September 10, 1898, upon condition of "the said Kelley paying to the said company on delivery of said deed of fifty-three thousand seven hundred and fifty dollars, less the sum of fifteen thousand dollars and interest thereon, etc." The deduction was the amount of two existing mortgages on the land which Kelley was to assume and pay.

Instead of tendering the above-named sum in money when calling for the deed of conveyance, the plaintiff Kelley, or his client, procured certificates of shares of the company's stock to the amount of 381 shares of the par value of $100 each, which, however, were not standing in the name of either on the books of the company. These certificates, indorsed or assigned in blank, the plaintiff tendered to the company (with an accompanying bill of sale of them) as good for $38,100 of the agreed purchase money. The balance ($600) he tendered in money. This tender of part money and part stock was refused.

The plaintiff claimed a right to tender stock instead of money under a by-law of the company adopted at the time of its organization, of the following tenor, viz: —

"Any stockholder shall have the right at any time to convert any or all of his holdings in the capital stock of the company into holdings in real estate upon such terms as may from time to time be prescribed by the directors;" which by-law was supplemented by a resolution of the board of directors passed November 2, 1892, "that hereafter the stock of this company shall be accepted at not less than its par value in payment for land."

It does not appear that the plaintiff or his client owned any of the stock of the company at the time of making the contract and execution of the bond for the conveyance. Indeed, a reasonable inference from the evidence is that he did not. A question is, therefore, raised whether the by-law and resolution include purchasers who were not stockholders at the time of the contract for purchase. We do not find it necessary to decide that question now, as this suit is more properly determinable upon other controlling facts.

About the time of the adoption of the resolution, a schedule price list of the company's lots of land was made and approved. No lots appear to have been sold for or paid for in stock, and for many months before this contract no sales at all appear to have been made. The business of the company had been for some time at a standstill. The president and the director, who made this contract for the company, both testify that the by-law and resolution had never been acted upon, and had escaped their memory, — that these were not in their minds, and that no allusion was made to either of them or to stock payments during the negotiations, — that they made a price less than forty per cent. of the schedule price and understood they were selling at that reduced price for cash. They were aged men, upwards of eighty, and we see no reason to doubt the truth of their testimony.

There is also evidence that the land was salable at that time at a price in money in the neighborhood of $50,000, while the stock, par value of $100, was not salable for over a few dollars per share. Indeed, some of the stock pledged as collateral had been sold after advertising for $1 per share, the pledgor not choosing to buy it in, though apprised of the time and place of sale.

The most that can be extracted for the plaintiff out of the evidence is that the officers of the company, supposing they were making an advantageous sale for money, by mistake made a disastrous sale for stock of doubtful value. Whether the sale was for money or for the stock was of great moment to both parties. Waiving the questions (1) whether the company had the power to sell its assets for its stock, and (2) whether the by-law, resolution, and bond will bear the construction contended for by the plaintiff, — it must be evident that a contract so construed would be largely one-sided. The plaintiff would obtain land of considerable money value for stock of little money value, while the defendant would suffer loss and be seriously crippled in its resources. These considerations, the mistake and the inequality, are enough to show that the court should not enforce specific performance, but should leave the plaintiff to such damages as he can recover at law, if any. Mansfield *v.* Sherman.

Decree below affirmed, with costs on the appeal.

WILLARD *v.* TAYLOE.

Supreme Court, United States, December, 1869

[8 *Wallace*, 557.]

Appeal from the Supreme Court of the District of Columbia.

In April, 1854, the defendant leased to the complainant the property in question, which was generally known in Washington as "The Mansion House," for the period of ten years from the 1st of May fol-

lowing, at the yearly rent of twelve hundred dollars. The lease contained a covenant that the lessee should have the right or option of purchasing the premises, with the buildings and improvements thereon, at any time before the expiration of the lease, for the sum of twenty-two thousand and five hundred dollars.

At the time of this lease gold and silver, or bank bills convertible on demand into it, were the ordinary money of the country, and the standard of values. In December, 1861, the banks throughout the country suspended payments in specie, and in 1862 and 1863, the federal government issued some hundred millions of notes, to be used as money, and which Congress declared should be a tender in the payment of debts.

Before the option expired the complainant elected to buy the property and tendered the amount of the first instalment of the purchase money in legal tender notes. The defendant refused to accept these, insisting upon payment in gold.[1]

Mr. Justice Field, after stating the facts of the case, delivered the opinion of the court as follows: —

The covenant in the lease giving the right or option to purchase the premises was in the nature of a continuing offer to sell. It was a proposition extending through the period of ten years, and being under seal must be regarded as made upon a sufficient consideration, and, therefore, one from which the defendant was not at liberty to recede. When accepted by the complainant by his notice to the defendant, a contract of sale between the parties was completed.[2]

When a contract is of this character it is the usual practice of courts of equity to enforce its specific execution upon the application of the party who has complied with its stipulations on his part, or has seasonably and in good faith offered, and continues ready to comply with them. But it is not the invariable practice. This form of relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case. The jurisdiction, said Lord Erskine,[3] "is not compulsory upon the court, but the subject of discretion. The question is not what the court must do, but what it may do under [the] circumstances, either exercising the jurisdiction by granting the specific performance or abstaining from it."

And long previous to him Lord Hardwicke and other eminent equity judges of England had, in a great variety of cases, asserted the same discretionary power of the court. In Joynes *v.* Statham,[4] Lord Hardwicke said: "The constant doctrine of this court is, that it is in their discretion, whether in such a bill they will decree a specific performance or leave the plaintiff to his remedy at law." And in Underwood *v.*

[1] The statement of the case is condensed; the arguments of counsel and a portion of the opinion are omitted. — Ed.

[2] Boston and Maine Railroad Company *v.* Bartlett, 3 Cushing, 224; Welchman *v.* Spinks, 5 Law Times, n. s. 385; Warner *v.* Willington, 3 Drewry, 523; Old Colony Railroad *v* Evans, 6 Gray, 25.

[3] 12 Vesey, Jr. 332.

[4] 3 Atkyns, 388.

Hitchcox[1] the same great judge said, in refusing to enforce a contract: "The rule of equity in carrying agreements into specific performance is well known, and the court is not obliged to decree every agreement entered into, though for valuable consideration, in strictness of law, it depending on the circumstances."

Later jurists, both in England and in the United States, have reiterated the same doctrine. Chancellor Kent, in Seymour *v.* Delancy,[2] upon an extended review of the authorities on the subject, declares it to be a settled principle that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court upon a view of all the circumstances; and Chancellor Bates, of Delaware, in Godwin *v.* Collins, recently decided, upon a very full consideration of the adjudged cases, says that a patient examination of the whole course of decisions on this subject has left with him "no doubt that, as a matter of judicial history, such a discretion has always been exercised in administering this branch of equity jurisprudence."

It is true the cases cited, in which the discretion of the court is asserted, arose upon contracts in which there existed some inequality or unfairness in the terms, by reason of which injustice would have followed a specific performance. But the same discretion is exercised where the contract is fair in its terms, if its enforcement, from subsequent events, or even from collateral circumstances, would work hardship or injustice to either of the parties.

In the case of the City of London *v.* Nash,[3] the defendant, a lessee, had covenanted to rebuild some houses, but, instead of doing this, he rebuilt only two of them, and repaired the others. On a bill by the city for a specific performance Lord Hardwicke held that the covenant was one which the court could specifically enforce; but said, "the most material objection for the defendant, and which has weight with me, is that the court is not obliged to decree a specific performance, and will not when it would be a hardship, as it would be here upon the defendant to oblige him, after having very largely repaired the houses, to pull them down and rebuild them." . . .[4]

The discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity. No positive rule can be laid down by which the action of the court can be determined in all cases. In general it may be said that the specific relief will be granted when it is apparent, from a view of all the circumstances of the particular case, that it will subserve the ends of justice; and that it will be withheld when, from a like view, it appears that it will produce hardship or injustice to either of the parties. It is not sufficient, as shown by the cases cited, to call forth the equitable interposition of the court, that the legal obligation under the contract to do the specific thing

[1] 1 Vesey, Sen. 279. [2] 6 Johnson's Chancery, 222. [3] 1 Vesey, Sen. 12.
[4] The court here stated the case of Faine *v.* Brown, given *supra*, 397. — Ed.

desired may be perfect. It must also appear that the specific enforcement will work no hardship or injustice, for if that result would follow, the court will leave the parties to their remedies at law, unless the granting of the specific relief can be accompanied with conditions which will obviate that result. If that result can be thus obviated, a specific performance will generally in such cases be decreed conditionally. It is the advantage of a court of equity, as observed by Lord Redesdale in Davis *v.* Hone,[1] that it can modify the demands of parties according to justice, and where, as in that case, it would be inequitable, from a change of circumstances, to enforce a contract specifically, it may refuse its decree unless the party will consent to a conscientious modification of the contract, or what would generally amount to the same thing, take a decree upon condition of doing or relinquishing certain things to the other party.

In the present case objection is taken to the action of the complainant in offering, in payment of the first instalment stipulated, notes of the United States. It was insisted by the defendant at the time, and it is contended by his counsel now, that the covenant in the lease required payment for the property to be made in gold. The covenant does not in terms specify gold as the currency in which payment is to be made; but gold, it is said, must have been in the contemplation of the parties, as no other currency, except for small amounts, which could be discharged in silver, was at the time recognized by law as a legal tender for private debts.

The kind of currency which the complainant offered is only important in considering the good faith of his conduct. A party does not forfeit his rights to the interposition of a court of equity to enforce a specific performance of a contract, if he seasonably and in good faith offers to comply, and continues ready to comply, with its stipulations on his part, although he may err in estimating the extent of his obligation. It is only in courts of law that literal and exact performance is required. The condition of the currency at the time repels any imputation of bad faith in the action of the complainant. The act of Congress had declared the notes of the United States to be a legal tender for all debts, without, in terms, making any distinction between debts contracted before, and those contracted after its passage. Gold had almost entirely disappeared from circulation. The community at large used the notes of the United States in the discharge of all debts. They constituted, in fact, almost the entire currency of the country in 1864. They were received and paid out by the government; and the validity of the act declaring them a legal tender had been sustained by nearly every State court before which the question had been raised. The defendant, it is true, insisted upon his right to payment in gold, but before the expiration of the period prescribed for the completion of the purchase, he left the city of Washington, and thus cut off the possibility of any other tender than the one made within that period. In the presence of this difficulty, respecting the mode of payment,

[1] 2 Schoales & Lefroy, 348.

which could not be obviated, by reason of the absence of the defendant, the complainant filed his bill, in which he states the question which had arisen between them, and invokes the aid of the court in the matter, offering specifically to perform the contract on his part according to its true intent and meaning. He thus placed himself promptly and fairly before the court, expressing a willingness to do whatever it should adjudge he ought in equity and conscience to do in the execution of the contract.

Nothing further could have been reasonably required of him under the circumstances.

The only question remaining is, upon what terms shall the decree be made? and upon this we have no doubt.

The parties, at the time the proposition to sell, embodied in the covenant of the lease, was made, had reference to the currency then recognized by law as a legal tender, which consisted only of gold and silver coin. It was for a specific number of dollars of that character that the offer to sell was made, and it strikes one at once as inequitable to compel a transfer of the property for notes, worth when tendered in the market only a little more than one-half the stipulated price. Such a substitution of notes for coin could not have been in the possible expectation of the parties. Nor is it reasonable to suppose, if it had been, that the covenant would ever have been inserted in the lease without some provision against the substitution. The complainant must, therefore, take his decree upon payment of the stipulated price in gold and silver coin. Whilst he seeks equity he must do equity.

The Chief Justice, with Nelson, J., concurred in the conclusion as above announced — that the complainant was entitled to specific performance on payment of the price of the land in gold and silver coin — but expressed their inability to yield their assent to the argument by which, in this case, it was supported.[1]

FRIEND, Appellant, *v.* LAMB.

Supreme Court, Pennsylvania, January 3, 1893.

[152 *Pennsylvania Reports*, 529.]

Opinion by Mr. Justice Green.[2] We are of opinion that the learned court below, rather than the master, adjudged correctly the

[1] In Hudson *v.* King, 2 Heisk. 560, the seller was not permitted to compel payment in legal tender, the bargain having been made during the war, when both parties expected payment would be made in Confederate money.

In Hale *v.* Wilkinson, 21 Gratt. 75, the buyer having paid in Confederate notes, as expected by the parties, the seller was compelled to convey after the war, although he insisted upon having payment in legal tender. — Ed.

[2] Only so much of the opinion of the court as relates to the question of hardship is given. The court was against the plaintiff by reason of his misrepresentations. — Ed.

facts and law of the present contention. It is not a case of mere legal right and is not dependent solely upon principles which control the determination of causes of that character. The proceeding is by bill in equity, and the relief sought is the specific performance of a contract for the sale of a tract of land for the price of fifty thousand dollars. The defendant against whom the contract is proposed to be enforced is a married woman, and as only five thousand dollars of the purchase money were to be paid in cash, the sale is to be regarded as one made almost entirely upon credit, and the credit is to be secured by a mortgage for the sum of forty-five thousand dollars in annual payments of five and seven thousand dollars respectively, with interest on all, and reaching over a period of seven years. For a man to encumber himself with such a contract would be, in all ordinary circumstances, a rash, improvident, and extremely hazardous undertaking. Nothing but a rare combination of fortunate events to occur in the very near future, capable of being foreseen by an extremely sagacious and experienced operator in speculative transactions, would justify such a contract in the ordinary judgment of men. But with a woman, especially a married woman, unless possessed of ample cash capital to meet her maturing payments, and a special skill and experience in conducting such affairs, an engagement of this character would seem to be almost entirely destructive of the least prospect of success, and improvident and oppressive to the last degree. There is no evidence in this case that Mrs. Lamb possessed any of the essential qualifications either in capital or experience to conduct such an enterprise to a successful conclusion. Where the money was to come from to meet the annual payments does not appear, and the consequences of "the usual *sci. fa.* clause" are well enough known to indicate what would become of the property if the payments were not promptly met. We deem the contract in this case as highly improvident and rash, and most likely to result in great disaster even before the maturity of the payments and therefore oppressive in its character. In its merely legal aspects these considerations could not be regarded and they would not constitute a defence to an action to recover damages for its breach. But in equity the rule is very different where the application is for a specific performance of the contract. It was thus expressed by this court in Freetly *v.* Barnhart,[1] where we said that "there is nothing better settled than that a decree for specific performance is not a matter of course, but rests in the sound discretion of a chancellor. It may be refused, therefore, notwithstanding a contract obligation, if there be circumstances rendering it inequitable, and then the party seeking it is left to his action for damages. I know of no case in which specific performance is ever decreed unless it appears to accord with good conscience that it should be so decreed, be the contract ever so specific in its terms."

To the same effect are Weise's Ap.,[2] Elbert *v.* O'Neil,[3] and Rennyson *v.* Rozell.[4] In the last of these cases our late Brother Clark said:

[1] 51 Pa. 279. [2] 72 Pa. 351. [3] 102 Pa. 302. [4] 106 Pa. 407.

"It is not sufficient to call forth equitable interposition of the court that the legal obligation under the contract may be perfect; if injustice would result from a decree for specific relief the parties must be remitted to their remedies at law. Even when the agreement is perfectly good, the price adequate and no blame attaches to the purchase, if the transaction be inequitable and unjust in itself, or rendered so by matters subsequently occurring, specific performance may be denied and the parties turned over to their remedy in damages: Henderson *v.* Hays;[1] Remington *v.* Irwin;[2] Freetly *v.* Barnhart."[3]

Decree affirmed and bill dismissed at the cost of the plaintiff.[4]

CLARKE *v.* THE ROCHESTER ETC. R. R. CO.

SUPREME COURT, NEW YORK, SEPTEMBER, 1854.

[18 *Barbour*, 350.]

T. R. STRONG, J.[5] The general act to authorize the formation of railroad corporations and to regulate the same, to the duties imposed by which the defendants are subject, provides that the corporations subject thereto shall erect and maintain fences on the sides of their road, and "farm crossings for the use of the proprietors of land adjoining such railroad." Laws of 1850, p. 211, §§ 50, 49, 44. No distinction is made, in terms, in respect to this duty to make crossings, between cases in which the lands of the corporation, occupied by their road, were obtained by agreement with and conveyance from the owners, and those in which title was acquired by the compulsory proceedings provided for by the act; and I think none was intended by the legislature. Nor is this provision, for making crossings, in terms limited to cases where the adjoining proprietors have farms, or any particular quantity of land to be benefited by the crossings; and if there is any limitation in cases within the language employed, to be

[1] 2 Watts, 148 [2] 14 Pa. 143. [3] 51 Pa. 279.

[4] Specific performance was refused in the following cases: McCarty *v.* Kyle, 4 Cold. 348. A contract to convey one's homestead and furniture in exchange for a share in a mining property, made in the excitement of a mining boom.

Talbot *v.* Ford, 13 Sim. 173. A contract by a lessee of a mine to give up, *at any time* before the end of the lease, his machinery and stock-in-trade at a valuation.

Denne *v.* Light, 8 D. M. & G. 774. A contract to buy land to which, being surrounded by the land of third persons, the seller could give no right of way.

Bates Co. *v.* Bates, 87 Ill. Ap. 225. A contract to give to plaintiff the benefit of all future inventions of the defendant. See the similar case of Ferguson *v.* Blackwell, 8 Okla. 489.

Fitzpatrick *v.* Dorland, 27 Hun, 291. The parties agreed to postpone execution of a contract of sale and purchase until unfounded adverse litigation of a stranger was settled. Unexpectedly to both parties this litigation continued for fifteen years, the property remaining vacant, and trebling in value. Taxes would have taken one half the purchase money.

See also —— *v.* White, 3 Sw. 108 n.; Nickels *v.* Hancock, 7 D. M. & G. 300; Gotthelf *v.* Stranahan, 138 N. Y. 345. — ED.

[5] Only the opinion of the court is given. — ED.

imposed by construction, it is merely that the crossings must be useful.

In the present case I am satisfied that the defendants are under a legal obligation to make such a crossing as is intended by the statute, for the use of the plaintiff; and probably an under crossing only would be suitable. But it does not necessarily follow that because such an obligation upon the defendants to the plaintiff exists, which they have refused to perform, the plaintiff is entitled to a judgment for a specific performance of it. An action for a specific performance is an appeal to the equitable jurisdiction of the court — the relief is matter not of absolute right in the party, but of sound discretion in the court; and to sustain such an action the granting of such relief must appear to be entirely equitable. The court will never compel a performance specifically when, looking at all the circumstances on both sides, it is apparent that injustice would thereby be done. In this case the lands in respect to which a crossing is sought are two parcels of a small village lot, separated by a conveyance from the plaintiff to the defendants, for the use of their road, of a small strip through the lot, which parcels are not occupied by any building, and of the value of which there is no direct evidence; but from the sum paid for the portion conveyed to the defendant, and for damages, it may fairly be concluded that it is small; no special circumstances, in regard to the manner in which the land has been or may be used, rendering a crossing necessary, are shown; and if an under crossing is to be made and maintained it must be constructed in a permanent manner, through an embankment about fifteen feet in height, the expense of which, it is manifest, would much exceed the value of such a crossing to the plaintiff. The case is therefore one in which there is not only an absence of proof that the enforcement of the performance of the alleged duty would be equitable, but it is affirmatively proved that it would be inequitable. The learned justice before whom this action was tried appears to have entertained the view that the burthen of performing the duty would be greatly disproportioned to the value of the land to be benefited by its performance. This is evident, not only from the opinion delivered by him, but from the provisions of the judgment, giving the defendants an election to pay the damages for not making a crossing, and, in case of their so electing, relieving them from the obligation to make it, and directing a reference to ascertain the damages. Under the circumstances of the case, I think it clear that the court ought not to adjudge a specific performance, and that the plaintiff should be left to his remedy for damages. If the judgment for a specific performance is erroneous, the error is not cured by the election which is given to the defendants.

Under the practice of the late court of chancery, in cases like the present, if it now prevailed, the complaint in this case would be dismissed; it would not be retained to allow the plaintiff compensation in damages. Story's Eq. Jur. §§ 794 to 800; Morss *v.* Elmendorf, 11 Paige, 277. But under the code the plaintiff is, I think, entitled to assert his claim for damages in this action.

The judgment is therefore reversed, and a new trial granted, to be had before a jury, with costs to abide the event; except that the plaintiff is in no event to have costs of the appeal.

New trial granted.[1]

C. R. CONGER *v.* THE NEW YORK, ETC., R. R. CO.

COURT OF APPEALS, NEW YORK, MARCH, 1890.

[120 *New York Reports*, 29.]

HAIGHT, J.[2] This action was brought to compel a specific performance of a contract. The Jersey City and Albany Railway Company was incorporated for the purpose of constructing and operating a railroad from Fort Montgomery, in the county of Orange, to a point on the Hudson River opposite to the city of New York. As such incorporation it entered into a written agreement with one Catherine A. Hedges, the plaintiff's grantor, in and by the terms of which she gave to the company a right of way across her premises in Rockland County upon certain conditions, one of which was that the company should locate a station in the gorge commonly known as the Long Clove, and stop thereat five express trains each way daily. Subsequently the Jersey City and Albany Railway Company was consolidated with the North River Railway Company, under the name of the North River Railroad Company, and that company was consolidated with the defendant, which was incorporated for the purpose of constructing and operating a railroad from the New Jersey state line through the state of New York to the city of Buffalo.

The defendant has entered upon the lands of the said Catherine A. Hedges and constructed its road-bed across the same, but it has not constructed any station thereon in the Long Clove Gorge or stopped any of its express trains thereat.

The trial court has found as facts that a suitable station for the

[1] Shrewsbury Co. *v.* N. W. Co., 6 H. L. C. 113, 139, 4 D. M. & G. 115; Murdfelt *v.* N. Y. Co., 102 N. Y. 703; Prospect Co. *v.* Coney Co., 144 N. Y. 152, 159 (*semble*); Hart *v.* Brown, 6 N. Y. Misc. Rep. 238 *Accord.*

See to the same effect Miles *v.* Dover Co., 125 N. Y. 294, in which case the court declined to compel the execution of a lease of a mine the working of which would be ruinous to both parties.

Specific performance against a seller was denied in Blake *v.* Flatley, 44 N. J. Eq. 228, the property in question being worth less than the costs of the suit.

If by reason of a change of conditions the plaintiff's object is no longer attainable specific performance will not be decreed against the defendant, if prejudicial to him. On this principle restrictive covenants against the use of land for business purposes are not enforced, if the neighborhood has lost its residential character. See, in addition to Jackson *v.* Stevenson, *supra*, 179, and the cases cited *supra*, 181, n. 9: Bedford *v.* Trustees, 2 M. & K. 552 (change effected with coöperation of plaintiff); East St. Louis Co. *v.* East St. Louis, 182 Ill. 433; Amerman *v.* Deane, 132 N. Y. 355. See also South Co. *v.* Highland Co., 119 Ala. 105.

Compare Roberts *v.* Cambridge, 170 Mass. 199. — ED.

[2] Only the opinion of the court is given. — ED.

accommodation of passengers and the receipt and delivery of freight at the Long Clove Gorge could be built by the defendant only at a considerable expense, because of the nature of the ground at that point; that the place where the plaintiffs demand that the station be located is near the mouth of a long tunnel, and at a sharp curve in the defendant's railroad, upon the side of a steep mountain approached by steep grades in both directions; that it is sparsely settled, and if a station were established there it would be of no use to the public; that very little, if any, benefit would result to the plaintiffs by the erection of a station or the stoppage of the trains thereat; that the public convenience would not be promoted, but the public travel would be delayed; and, as a conclusion of law, that a specific enforcement of the agreement would work hardship and injustice to the defendant, and such enforcement would not subserve the ends of justice; that specific performance should be denied and the plaintiffs left to their action for damages for a breach of the contract. The evidence sustains the findings of the trial court which have been affirmed by the General Term.

The questions for our consideration are, therefore, narrowed to a determination as to whether the conclusions of law reached are justified under the findings of fact.

It has become the well-settled doctrine of this court that the specific performance of a contract is discretionary with the court, and that performance will not be decreed where it will result in great hardship and injustice to one party, without any considerable gain or utility to the other, or in cases where the public interest would be prejudiced thereby. Clarke *v.* R. L. & N. F. R. R. Co.; Trustees of Columbia College *v.* Thacher;[1] Murdfeldt *v.* N. Y., W. S. & B. R. R. Co.;[2] Day *v.* Hunt.[3]

As we have seen, the Long Clove Gorge is located upon the side of a steep mountain, in a sparsely settled district, and is approached by a steep grade, and that a passenger station with an approach thereat could be constructed only at a considerable expense. These are reasons worthy of consideration, but if there were no others, the trial court might not have deemed them sufficient to refuse specific performance. But they are followed by another, which gives additional force and weight, and that is that public travel will be delayed by the stoppage of the trains, and that the public convenience will not be promoted.

The defendant is a corporation organized under the laws of the state, and is a common carrier of passengers and freight; its duties are largely of a public nature, and it is bound to so run its trains and operate its road as to promote the public interest and convenience, and in view of the fact that but little if any benefit would result to the plaintiffs by the erection of a station and the stoppage of trains thereat, as found by the trial court, it appears to us that that court

[1] 87 N. Y. 311–317. [2] 102 id. 703. [3] 112 id. 191–195.

properly refused to decree specific performance and remanded the plaintiffs to their action for damages.

The judgment should be affirmed, with costs.

All concur, except BROWN, J., not sitting.

Judgment affirmed.[1]

T. L. CURRAN *v.* HOLYOKE WATER POWER CO.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER 23, 1874.

[116 *Massachusetts Reports*, 90.]

WELLS, J.[2] The plaintiff seeks to enforce specific performance of an oral agreement for the sale and conveyance to him of a parcel of land for a building lot in Holyoke. That such an agreement was made is clearly proved and admitted; also that the plaintiff has paid the full consideration, has gone into possession, and has erected a substantial building upon the lot, in good faith, relying upon the permission of the defendant that he should do so without waiting for the delivery of a deed. The bargain was for a lot with its front upon Park Street, between Adams and Sargeant streets, and adjoining a lot previously sold by the defendant to one McCabe. The plaintiff claims that his lot extends to a line which would leave Park Street fifty feet wide. The defendant contends that the front line should be ten feet further back, leaving Park Street sixty feet wide; and is ready to convey to the plaintiff the lot so bounded.

Since the agreement of sale was made, the defendant has conveyed to other parties other lots between Adams and Sargeant streets, bounding them upon the line of East Street, which connects with Park Street at a slight angle, at or near the front of the plaintiff's lot. The master reports that "at the time said bargain was made the company contemplated changing, or had changed, the line of Park or East Street," so that the new line of East Street, upon which the lots so conveyed to other parties were bounded, would meet the line of Park Street, if only fifty feet wide, at or near the corner of McCabe's lot, cutting off a small piece of the front of the plaintiff's lot, as claimed by him; but if Park Street were to be kept at the width of sixty feet, the two lines would meet near the opposite side of the plaintiff's lot. At that corner, the plaintiff's lot, as staked out and built upon by him, projects into the street nearly ten feet in front of the new line of East Street.

The defendant when refusing to deliver a deed in conformity with

[1] Lloyd *v.* London Co., 2 D. J. & S. 568, 581, per Knight Bruce, L. J. (But see s. c. 579, per Turner, L. J., *contra*); Goding *v.* Bangor Co., 94 Me. 542 *Accord.*

But a merely temporary inconvenience to the public is not a sufficient reason for refusing specific performance of a contract. Raphael *v.* Thames Co., 2 Ch. Ap. 147. — ED.

[2] Only a portion of the opinion of the court is given. — ED.

the claim of the plaintiff, and also by the answer to the suit, and at the hearing before the master, has offered to make reasonable compensation to the plaintiff, not only by moving back his building, but also by paying him for the land claimed by him, which is cut off by the line of the street. This the plaintiff refuses to accept; but does not show that he may not thus be fully indemnified. His right to a specific performance of the agreement is not absolute, but rests in the discretion of the court, to be exercised upon equitable considerations in view of all the circumstances of the case. This would be so even if the agreement were fully and satisfactorily made out precisely as claimed by him.

It is manifest that, if the agreement were so made, it was by inadvertence, the defendant at the time not perceiving the interference with the contemplated lines of East Street. The rights of other parties who have in good faith purchased lots upon East Street, and, as the defendant alleges, have erected buildings thereon, have intervened; and although those rights are subsequent in time, and therefore subordinate to those of the plaintiff, yet they furnish equitable considerations to be regarded in adjudicating the rights between the parties to this suit. If the plaintiff can have full and complete indemnity upon his contract otherwise, equity does not require that he should have specific performance by which he will inflict great and unnecessary injury upon other persons who are in no way responsible for the position in which he is placed.

We are of opinion therefore that specific performance should be refused, unless the plaintiff will accept a conveyance with boundaries conforming to the line of East Street, and with compensation for the land cut off by that line and for the damages occasioned by the necessity of removing his building from the limits of the street. If he shall elect to accept such conveyance and compensation, a decree may be entered accordingly, and a master appointed to see to its execution and to determine the amount of such compensation, and the mode in which it shall be rendered. Otherwise he will be remitted to his action at law for damages upon the entire contract, and this bill will be *Dismissed.*[1]

[1] In Owens *v.* McNally, 113 Cal. 444, a bachelor uncle contracted to bequeath to his niece all his property in consideration of her coming to live with him and caring for him. The niece performed all that was expected of her, but the uncle having married subsequently, the court refused to enforce the contract against his representatives, because of the hardship upon his widow. See to the same effect Winne *v.* Winne, 166 N. Y. 263, 269; Gall *v.* Gall, 64 Hun, 600. — Ed.

TWINING *v.* MORRICE.

IN CHANCERY, BEFORE SIR LLOYD KENYON, M. R., EASTER TERM, 1788.

[2 *Brown, Chancery Cases*, 326.]

MORRICE, Taggart, and Addison, trustees for the sale of certain premises, agreed among themselves that the first lot should not be sold for less than 2000*l*., and, if that should be sold for that price, the others should go for what they could fetch. Mr. Blake, who was concerned as solicitor for the sellers, was present at that meeting, and knew what was settled with respect to the price, but was not employed by the vendors to bid for them, but other persons were employed for that purpose. Afterwards, at the place of sale, the plaintiff, Mr. Twining, seeing Mr. Blake, held some conversation with him, and desired him to bid for the estate for him (Mr. Twining). The lots were put up to sale, and Mr. Blake bid 1500*l*. for lot one, and afterwards, in consequence of one of the vendors bidding against him, he bid 2000*l*., at which price the lot was knocked down to him, and he afterwards bid for lot two 170*l*. and for lot three 280*l*., at which prices these lots were also knocked down to him, and he paid the deposit, according to the conditions of sale. No person bid at the sale but Mr. Blake and the bidders for the vendors.

The trustees requested Mr. Twining to relinquish his purchase because they had been deceived by Mr. Blake, whom they considered as their agent, bidding for Mr. Twining. The plaintiff would not give up his purchase, but filed his bill for a specific performance.

The defendants, Taggart and Addison, by their answers, swore that at the time of the sale they believed that Mr. Blake was bidding for the vendors, and Taggart filed a cross-bill against Twining and Blake, stating the same thing, and praying that the biddings might be set aside as fraudulent and void against him.

Mr. Twining, by his answer to the cross-bill, stated his meeting with Blake as accidental, and that, not choosing to bid himself, he desired him to bid for him, and that Blake actually did so, and that he knew nothing of Blake's acting as attorney for the vendors.

MASTER OF THE ROLLS. The ground I shall go upon leaves the character of all parties unimpeached. The sale intended was a sale by auction, where every one who would might bid; if anything therefore happened that would cast a damp upon the sale it must be hurtful to the vendor. With respect to bidders being employed for the vendor, I do not say the doctrine in Bexwell *v.* Christie[1] is wrong; but everybody knows that such persons are constantly employed. It is said if those persons were known it would be inconvenient and detrimental, because it would deter fair bidders: but if it was the idea of the per-

[1] Cowp. 395.

sons present at this sale that Mr. Blake was such a bidder, it was detrimental to the vendor. Here he was known to be the agent of the vendor, he began early as a bidder, and, in fact, was the only real bidder. It is likely that he should be thought, by the persons present, to bid for the vendor, and, if I believe the witnesses, I must believe that it did chill the sale. Into this situation he was brought by the conference with Mr. Twining: the fair consequence is, that the sale did not proceed with so much advantage as it otherwise would have done. Mr. Scott said, if I thought the persons in the room thought him a puffer, it was thinking him what the law would not allow him to be; I cannot say I think so, as they knew the practice to be to employ such persons. By an inadvertent act, Mr. Blake was in a situation which hurt the sale, and was put into that situation by Mr. Twining: it is therefore not such a case that I can decree a specific performance. I will not set the contract aside, but will leave the plaintiff to his remedy at law.

Both bills dismissed.

CRAGG *v.* HOLME.

In Chancery, before Sir W. Grant, M. R., May, 1811.

[18 *Vesey*, 14, n. (12).]

The bill for a specific performance was dismissed without costs; though the plaintiff had not contributed to make the defendant drunk, or taken any advantage of his situation; and the Master of the Rolls said he would not have decreed the agreement to be delivered up; that the court would not act on either side.[1]

[1] Cooke *v.* Clayworth, 18 Ves. 12, 15 (*semble*); Nagle *v.* Baylor, 3 Dr. & War. 60, 64 (*semble*) *Accord.* In Cooke *v.* Clayworth, 18 Ves. 12, 15, Sir William Grant, M. R., said: "A court of equity ought not to give its assistance to a person who has obtained an agreement or deed from another in a state of intoxication; and on the other hand ought not to assist a person to get rid of any agreement or deed merely upon the ground of his having been intoxicated at the time.

But if a third person, with knowledge of a contract like that in the principal case, induces the vendor to convey the land to him, he cannot use the intoxication of the vendor as a bar to a bill praying a conveyance by himself to the original purchaser. Shaw *v.* Thackray, 1 Drew. Sm. 537.

In Cuff *v.* Dorland, 50 Barb. 438, specific performance was refused, although the case was free from fraud or undue advantage, because the plaintiff contracted with the defendant, a widow, in embarrassed circumstances and confined to the house by ill health, without seeing to it that she had outside counsel from some friend or legal adviser. — Ed.

DOWSON *v.* SOLOMON.

In Chancery, before Sir R. T. Kindersley, V. C., December 23, 1859.

[1 *Drewry and Smale*, 1.]

The Vice-Chancellor.[1] This is a suit by vendors for specific performance of a contract to purchase a certain leasehold house and premises. The defendant, the purchaser, insists that by reason of the dropping of the insurance the title became defective, and that therefore the contract is at an end; or, at all events, that it is a case in which the court will not under the circumstances decree specific performance.

There are in the present case certain special and peculiar circumstances which lead me to the conclusion that it is one of those cases in which the court ought not to decree specific performance. The vendors knew, at least Mr. Dowson (who seems to have been the one of the trustees for sale who acted for the others) knew, that the policy which existed at the date of the contract would expire on the 24th of June, that is, not quite a month before the day fixed for the completion of the purchase; and Mr. Dowson, knowing that it was the duty of the vendors to renew, went to the insurance office and renewed the insurance; but instead of the ordinary policy for twelve months, he renewed by taking a policy for one month only, so as to carry the insurance on to the 24th of July, that is, only four days beyond the day fixed for the completion of the contract, expecting, no doubt, that the completion would take place on that day, and probably intending on that day, when they met to complete, to give the information to the purchaser, who would then have just time enough to renew the insurance. Now, I see no reason to suspect that Mr. Dowson intended any harm to the purchaser; indeed, he could have no motive for that. I assume according to his own representation that he had completely forgotten the matter, and unfortunately he not only forgot to mention the matter to the purchaser, but he also forgot to mention it to his own co-trustees, or to the solicitor for the vendors. This conduct, however unintentionally on the part of Mr. Dowson, in effect operated as a trap into which the purchaser would fall if he should omit to exercise due diligence; and unfortunately the purchaser fell into it. I do not mean to say that the vendors were bound to renew for a year; but if in renewing they thought fit

[1] Only a portion of the judgment of the court is given. The contract of sale and purchase was made on June 8, 1858, and the purchase was to be completed on the 20th of July following, but by reason of disputes as to fixtures the meeting for completion was delayed until August 26th. By the terms of the lease the landlord had the right to reënter and avoid the lease, if the lessee failed to keep the premises insured. The seller, finding that the insurance would expire on June 24th, renewed the insurance, not for a year as is customary, but for one month only. — Ed.

to run the matter so fine as to cause great risk to the purchaser, they must not be surprised if a court of equity refuses to lend them its assistance against the purchaser. Moreover, when the fact of the dropping of the insurance was discovered on the 26th of August at the meeting which was held for the purpose of completion, the purchaser offered still to complete the purchase if the vendors would procure a letter or document from the lessors to the effect that they would not take advantage of the forfeiture. This proposal was unfortunately declined by the vendors: and on the 7th of September the purchaser sent them a written notice declining altogether to complete the contract. The vendors, it is true, did afterwards think better of the matter, and ultimately effected a new insurance, and procured from the lessors a letter waiving the forfeiture. But the purchaser adhered to his notice of the 7th of September, and therefore the waiver was too late. Under all the circumstances I am of opinion that I ought not to assist the vendors by decreeing specific performance; and therefore the bill must be dismissed, but without costs.

HIGGINS *v.* BUTLER.

SUPREME JUDICIAL COURT, MAINE, DECEMBER 27, 1886.

[78 *Maine Reports*, 520.]

HASKELL, J.[1] The orator seeks a decree for specific performance of the respondent's agreement with him to make the conveyance.

The property said to have been conveyed to the mother and inherited by the respondent, and by her agreed to be conveyed to the orator, is valued by some witnesses at twelve hundred dollars. The consideration, that is said to have been paid by the orator for the respondent's agreement to convey, was the delivery of a horse valued by some witnesses at one hundred dollars. Whatever agreement the respondent made was doubtless under the impression that she could not hold the land, but had only a claim against it for money that she had expended in the support of her father's family, amounting to a considerable sum.

The evidence touching the agreement is so conflicting and unsatisfactory, and the agreement, standing by itself, as it must stand in this cause, is so unreasonable, that the court hesitates relief, and refers the parties to a court of law, where such damages may be recovered as the law may give. Woodbury *v.* Gardiner.[2]

Bill dismissed.

1 The arguments and a part of the opinion are omitted. — ED.

2 77 Maine, 71.

T. F. McMANUS *v.* CITY OF BOSTON.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY 19, 1898.

[171 *Massachusetts Reports*, 152.]

BILL in equity for specific performance of an agreement [by the city of Boston] to purchase a tract of land of the plaintiff.

BARKER, J.[1] The remaining question is whether the facts that the plaintiff bought the land on November 5, 1896, for $5700, in anticipation of the action of the school committee and street commissioners, and shortly after offered it to the city for $9500, not disclosing what the land had cost him, should cause the court in its discretion to refuse a decree for specific performance.

These facts do not of themselves show that the contract was unreasonable or unfair or inequitable, or that it was tainted with fraud or bad faith, or that it would operate as a fraud on the public. The allegations of the answer that the full value of the land was $5700, and that $9500 was an exorbitant and excessive price for it, are not found by the report to be true. The circumstances stated in the report are suspicious, but are yet consistent with the fact that the price at which the board of street commissioners voted to purchase the land was a fair one, and that there was no fraud or bad faith. If the price was so exorbitant as to make the contract unconscionable, a court of equity would not decree specific performance. We should not, however, refuse to grant that relief merely because the vendor, ascertaining that a certain parcel of land would be needed for a public purpose, had had the address to purchase it at much less than its fair value, and then to sell it to the city at a fair price, through a board charged with the duty of taking it for the city by purchase or otherwise. If the price was exorbitant, the contract might well, under the circumstances, be found to be unconscionable, and one which a court of equity would not specifically enforce. As this was not proved, and as there was a contract of purchase which the city has failed to perform, we think the plaintiff is entitled to a decree.

Decree for the plaintiff.

1 Only a part of the opinion of the court is given. — ED.

SECTION XII.

Mutuality of Equitable Relief.

HATTON *v.* GRAY.

In Chancery, before Lord Guilford, C., June 14, 1684.

[2 *Cases in Chancery*, 164.]

Hatton sold houses to Gray for 2000*l*. Note was made by Hatton of the agreement, signed by Gray but not by Hatton.

Mr. Solicitor. The note binds not him who signed it not, for the Statute of Frauds and Perjuries, &c., and therefore in equity cannot bind the other party, for both must be bound, or neither of them in equity. But decreed contrary.[1]

CLAYTON *v.* ASHDOWN.

In Chancery, before Lord Harcourt, C., 1714.

[9 *Viner's Abridgment*, 393 (*G.* 4), *placitum* 2.]

Bill to have a specific performance of an agreement, &c., upon this case. Mr. Fuller during his minority by himself and guardian enters into articles with the defendant to let him a farm at a certain rent, &c. The defendant enters upon the farm, and continues the pos-

[1] Coleman *v.* Upcot, 5 Vin. Ab. 527, pl. 17; Buckhouse *v.* Crosby, 2 Eq. Ab. 32, pl. 44, 3 Sw. 434 n. s. c.; Seton *v.* Slade, 7 Ves. 264, 275; Fowle *v.* Freeman, 9 Ves. 351; Allen *v.* Bennet, 3 Taunt. 169, 176; Western *v.* Russell, 3 V. & B. 187, 192; Martin *v.* Mitchell, 2 J. & W. 413, 426; Palmer *v.* Scott, 1 R. & My. 391; Sutherland *v.* Briggs, 1 Hare, 26, 34; Morgan *v.* Holford, 1 Sm. & G. 101; Martin *v.* Pycroft, 2 D. M. & G. 785, 795; Ormond *v.* Anderson, 2 Ba. & Be. 363, 370; Chambers *v.* Ala. Co., 67 Ala. 353; Moses *v.* McClain, 82 Ala. 370; Davis *v.* Robert, 89 Ala. 402, 405; Vassault *v.* Edwards, 43 Cal. 458; Hodges *v.* Kowing, 58 Conn. 12; Terry *v.* Paschal, 103 Ga. 134, 137; Farwell *v.* Lowther, 18 Ill. 252; Esmay *v.* Gorton, 18 Ill. 483; Estes *v.* Furlong, 59 Ill. 298, 302; Gradle *v.* Warner, 140 Ill. 123; Shirley *v.* Shirley, 7 Blackf. 452; Getchell *v.* Jewett, 4 Me. 350; Rogers *v.* Saunders, 16 Me. 92; Old Colony Co. *v.* Evans, 6 Gray, 25; Dresel *v.* Jordan, 104 Mass. 407, 412; Slater *v.* Smith, 117 Mass. 96; Austin *v.* Wacks, 30 Minn. 335; Marqueze *v.* Caldwell, 48 Miss. 23; Atkinson *v.* Whitney, 67 Miss. 655; Peevey *v.* Haughton, 72 Miss. 918; Luckett *v.* Williamson, 37 Mo. 388, 395; Mastin *v.* Grimes, 88 Mo. 478; Smith *v.* Wilson, 160 Mo. 157; Ide *v.* Leiser, 10 Mont. 5; Carskaddon *v.* Kennedy, 40 N. J. Eq. 259, 263; Woodruff *v.* Woodruff, 44 N. J. Eq. 349, 355; Miller *v.* Cameron, 45 N. J. Eq. 95; Borel *v.* Mead, 3 N. Mex. 84; *In re* Hunter, 1 Edw. 1; Clason *v.* Bailey, 14 Johns. 484; Palmer *v.* Gould, 144 N. Y. 671, 678, 679; Pettibone *v.* Moore, 75 Hun, 461; Muller *v.* Vettel, 25 How. Pr. 350; White *v.* Schuyler, 31 How. Pr. 38; Silvester *v.* Born, 132 Pa. 467; Parker's Est., 19 Pa. Co. Ct. R. 606; Ives *v.* Hazard, 4 R. I. 14; Central Co. *v.* Johnston, 95 Va. 223 (correcting intimations to the contrary in earlier cases); Craig *v.* Boggs, 19 W. Va. 240; Cheny *v.* Cook, 7 Wis. 413; Doctor *v.* Hellberg, 65 Wis. 415; Wall *v.* Minneapolis Co., 86 Wis. 48 *Accord.*

Lipscomb *v.* Watrous, 3 Dist. Col. Ap. 1; Duvall *v.* Myers, 2 Md. Ch. 401 *Contra.* — Ed.

session, and pays the rent after Mr. Fuller came of full age. After that Mr. Fuller conveys the inheritance to the plaintiff, and then the defendant quits the farm, insisting that he was only tenant at will, and refuses to accept a lease, or execute a counterpart, because Mr. Fuller, being an infant at the time of making the agreement, was not bound by it, and therefore the defendant ought not to be bound by it. It was insisted that the defendant was bound by the articles, though Mr. Fuller had his election at his full age to perform or not perform the articles; for though in such cases the infant has his election at his full age, the other party has not his election, but is bound by such agreement with an infant. It was insisted by the defendant that this bill is brought by a purchaser of the inheritance, and this covenant does not run with the land, nor is transferred by the statute H. 8. But Harcourt, C., decreed that the plaintiff should execute a lease to the defendant, and the defendant execute a counterpart of such lease to the plaintiff in pursuance of the articles, and the defendant to pay costs.

FLIGHT *v.* BOLLAND.

In Chancery, before Sir John Leach, M. R., March 17, 1828.

[4 *Russell*, 299.]

The bill was filed by the plaintiff, as an adult, for the specific performance of a contract. After the suit was ready for hearing, the defendant, having discovered that the plaintiff was, at the time of the filing of the bill, and still continued, an infant, moved the court that the bill might be dismissed, with costs to be paid by the plaintiff's solicitor. Upon that occasion the Vice-Chancellor made an order that the plaintiff should be at liberty to amend his bill by inserting a next friend for the plaintiff; and the bill was amended accordingly.

Upon the opening of the case a preliminary objection was taken that a bill on the part of an infant for the specific performance of a contract made by him could not be sustained.[1]

The Master of the Rolls. No case of a bill filed by an infant for the specific performance of a contract made by him has been found in the books. It is not disputed that it is a general principle of courts of equity to interpose only where the remedy is mutual. The plaintiff's counsel principally rely upon a supposed analogy afforded by cases under the Statute of Frauds, where the plaintiff may obtain a decree for specific performance of a contract signed by the defendant, although not signed by the plaintiff. It must be admitted that such now is the settled rule of the court, although seriously questioned by Lord Redesdale upon the ground of want of mutuality. But these cases are supported, first, because the Statute of Frauds only requires

[1] The arguments of counsel are omitted. — Ed.

the agreement to be signed by the party to be charged; and next, it is said that the plaintiff, by the act of filing the bill, has made the remedy mutual. Neither of these reasons applies to the case of an infant. The act of filing the bill by his next friend cannot bind him; and my opinion therefore is that the bill must be dismissed, with costs to be paid by the next friend.[1]

FENNELLY AND OTHERS *v.* ANDERSON.

IN CHANCERY, IRELAND, BEFORE RIGHT HON. MAZIERE BRADY, C., NOVEMBER 13, 1851.

[1 *Irish Chancery Reports*, 706.]

THE LORD CHANCELLOR.[2] The contract, being one for the sale of the real estate of married women, has been entered into by them and their husbands, and is specific in its terms, and not alleged to be in any respect unreasonable or improper. The objection raised on behalf of the respondent is that this contract cannot be enforced against him, inasmuch as he could not enforce it against the married women. It is conceded that there is not any case deciding that such an agreement could not be enforced at the suit of the husband and wife. Formerly it was the doctrine of courts of equity that such a contract might be enforced against the husband. Decrees have more than once required the husband to procure the wife to levy a fine, or that he should stand by the consequences if she refused. So long as that was the rule of the court, I apprehend that such an objection as the present would have been unsustainable, because it rests upon the absence of mutuality of remedies for enforcement of the contract, viz., that as the petitioners could not have been compelled to perform it, the respondent cannot be so compelled.

But it is said that according to the modern authorities, the rule appears to have been changed, and that the court will not compel the husband to procure the concurrence of his wife if she refuse to join him. And that I apprehend is now well settled, notwithstanding any fluctuation of opinion which may have taken place on the point. But still the question remains, whether the change of the doctrine of the court in that particular involves a change in another; whether although the court will not enforce the contract against the husband, it

[1] Richards *v.* Green, 23 N. J. Eq. 536, 538 (*semble*); Ten Eyck *v.* Manning, 52 N. J. Eq. 47, 51 (*semble*); Tarr *v.* Scott, 4 Brewst. 49 (*semble*) *Accord.*

Seaton *v.* Tohill, 11 Colo. Ap. 213 (*semble*); Smith *v.* Smith, 36 Ga. 184 (*semble* — contract mutually enforceable because made by trustee of infant).

If a contract between two adults becomes, by the death of one and the descent of his land to an infant heir, unenforceable temporarily against the heir, this want of mutuality will not defeat a bill by the heir for specific performance against the surviving promisor. Moore *v.* Randolph, 6 Leigh, 175 (*semble*). — ED.

[2] Only a part of the judgment of the court is given. — ED.

will do so against the other party to the agreement, he being competent to perform it, and being aware of the position of the vendors. The only case which by analogy bears upon the point is Flight *v.* Boland, where Sir John Leach, M. R., held that an infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. Such undoubtedly was the decision; but it is worthy of note, that counsel for the plaintiff there said: "If a husband seised *jure uxoris* were to contract for the sale of his wife's estate, the husband and wife could enforce the contract against the purchaser; yet if the purchaser were to file a bill against the husband and wife for specific performance, and the husband were to swear in his answer that the wife would not consent, a court of equity would not now interfere; it would neither decree the wife to join in the conveyance, nor would it order the husband to procure her concurrence, and send him to prison until that concurrence was obtained." This tends to show that the opinion of the profession is, that the contract might be enforced by the husband and wife, notwithstanding the want of mutuality. The only answer attempted there by counsel for the defendant was: "No case has occurred, or at least none has occurred since the time when it was settled that the court will not decree a husband, who has contracted for the sale of his wife's estate, to procure her to join in making a good conveyance, in which such a contract has been enforced against the purchaser." The question does not appear to have been adverted to in the judgment of the court.

The next case in which this point appears to have been alluded to is Salisbury *v.* Hatcher,[1] where Knight Bruce, V. C., in the progress of the argument, put this question: "Suppose husband and wife, seised in fee in the wife's right, to contract to sell; is there any case which decides that they cannot by bill enforce the contract?" Counsel for the defendant did not venture to say that there was such a decision, but assuming the position to be incontrovertible, replies: "In that case the purchaser buys the estate subject to the chance of the wife repudiating the contract. But if the contract of sale states the property to be the husband's, and in the course of the negotiation it turns out to be the wife's, the vendors cannot compel a sale." The Vice-Chancellor did not again mention the point, but he decreed specific performance of the contract, which was one for the sale of an estate in fee-simple, in favor of a vendor who at the time of entering into the contract was tenant for life only, the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor, and the latter being able, by the consent of parties interested in remainder, to make a good *prima facie* title to the fee-simple at the hearing. So far, therefore, as regards the modern authorities, since the change in the rule as to enforcing the contract against the husband, no decision has occurred; but to the extent to which the opinion of the profession at Westminster Hall has been expressed in reference to it, when casually mentioned, that opinion would appear to be in support of the suit in such a case as the present.

[1] Y. & C., C. C. 54.

Returning to the earlier authorities, I find that in Daniel *v.* Adams,[1] which was a suit by a purchaser for the specific performance of an agreement for the sale of real estate by a husband and wife, counsel for the plaintiff, of whom Mr. Ambler, the reporter, was one, arguendo, said, that if a bill had been brought by the husband and wife, for performance of the agreement, the purchaser could not have made the objection, and therefore the husband and wife ought not to be permitted to do it on the bill brought by the purchaser. Sir Thomas Sewell, M. R., dismissed the bill, but said that "the argument that both or neither should be bound does not hold in all cases." At all events Mr. Ambler's position was not denied by the court.

That the objection of want of mutuality of remedy to enforce the contract does not in all cases prevail, is manifested by cases decided under the Statute of Frauds, where it has been held that the plaintiff may obtain a decree for specific performance of a contract signed by the defendant but not signed by the plaintiff. The reason of this doctrine is, that the plaintiff by filing his bill submits to perform his part of the contract; and of the plaintiff's non-signature, the other party is not allowed to avail himself, because although he could not have compelled the plaintiff to complete the contract, yet he (the defendant) has, by signing, thought proper to run the chance of the plaintiff performing his part, which, if he do not rely upon the Statute of Frauds, the court will decree him to perform. True it may be, however, that these decisions rest upon the particular language of that statute.

But in the present case the married women are willing to join in the conveyance, and I am not aware of any precedent for holding that the court will not enforce a contract against a husband and wife where it appears that the wife is willing to concur in performing her part of the contract, if the court be of opinion that it is a proper contract and one to the benefit of which the plaintiff would irrespectively of the question of the wife's competency be entitled. Nor will the court, as I am yet aware, on the other hand, decline to entertain a suit by the husband and wife, merely on the ground of the wife's incompetency to contract. Pending the negotiation these married women might have validated the contract by acknowledging it under the statute 4 & 5 W. 4, c. 92. The success of every suit for specific performance of contracts with regard to real estate is contingent upon the ability of the plaintiffs to make out title (unless the contract be a qualified one), and upon this question I must deem that this suit is so contingent; therefore if the petitioners cannot or will not convey, there cannot be any relief: but in this respect the case of the parties here is not, in my opinion, in any greater infirmity than any other case. I can easily imagine instances in which it would be very beneficial to married women that contracts entered into by them and their husbands should be carried out. On the whole, there are difficulties in coming to the conclusion that they cannot; and I should not feel justified in introducing a restriction which may not be a wise one, and which I no-

[1] Ambler, 495, 497.

where find already established. I therefore shall not, upon the ground of non-mutuality, dismiss this petition.[1]

NORRIS *v.* FOX.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF MISSOURI, MARCH 3, 1891.

[45 *Federal Reporter*, 406.]

THIS is a bill for specific performance of a contract for the exchange of lands. Norris, the complainant, by an agreement in writing dated September 12, 1889, bound himself "to procure a warranty deed conveying . . . to defendant Fox," subject to a certain incumbrance, certain land situated in Butler County, Kan., and "to furnish an abstract showing good title," except as to the incumbrance, in consideration whereof Fox on his part agreed and bound himself "to convey by general warranty deed to W. H. Norris, or any one named by him," certain land situated in Monroe County, Mo. At the time the contract was executed the title to the Kansas land was vested in one J. E. Robbins. Norris subsequently obtained a deed from Robbins and wife to Fox, but the latter refused to accept the same, or comply with the contract, for various reasons unnecessary to be mentioned, whereupon the present bill was filed.

THAYER, J. (after stating the facts as above). Specific performance cannot be enforced in this instance for want of mutuality in the contract, so far as the remedy for its enforcement is concerned. The rule is fundamental that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties at the time it is executed have the right to resort to equity for its specific enforcement. Marble Co. *v.* Ripley;[2] Bodine *v.* Glading;[3] Duvall *v.* Myers;[4] German *v.* Machin;[5] Boucher *v.* Van Buskirk;[6] Duff *v.* Hopkins.[7] And where a contract when executed is not specifically enforceable against one of the parties, he cannot, by subsequent performance of those conditions that could not be specifically enforced, put himself in a position to demand specific enforcement against the other party. Hope *v.* Hope;[8] Fry, Spec. Perf. (3d ed., Amer. Notes) § 443. In the case at bar the agreement of Norris to procure a warranty deed of land, at the time belonging to another, was of that nature that only an action at law would lie for a breach of the agree-

[1] Berry *v.* Berry, 31 Iowa, 415 (*semble*); Logan *v.* Bull, 78 Ky. 607; Freeman *v.* Stokes, 12 Phila. 219 (*semble*); but see Tarr *v.* Scott, 4 Brewst. (Pa.) 49 (*semble, contra*); Jarnigan *v.* Levisy, 6 Lea, 397; Mullens *v.* Big Creek Co. (Tenn. 1895) 35 S. W. Rep. 439; Hoover *v.* Calhoun, 16 Gratt. 109, 112 (*semble*) *Accord.*

See, however, an adverse criticism in Fry, Sp. Perf. (3d ed.) 217. — ED.

[2] 10 Wall. 340.
[3] 21 Pa. 50.
[4] 2 Md. Ch. 401.
[5] 6 Paige, 281.
[6] 2 A. K. Marsh. 345.
[7] 33 Fed. R. 599-608.
[8] 8 D. M. & G. 731-736.

ment. As Fox could not compel specific performance of the contract when made, and only had his remedy at law by a suit for damages, the complainant must resort to the same remedy.

The bill is dismissed, without prejudice to the complainant's right to sue at law.[1] 199 Ill 189 209 Ill 120

HILLS *v.* CROLL.

IN CHANCERY, BEFORE LORD COTTENHAM, V. C., JULY, 1845.

[2 *Phillips*, 60.]

Patent

THE defendant being the patentee of certain inventions for manufacturing and purifying gas, an agreement was entered into on the 22d of March, 1841, between him and the plaintiff, whereby, in consideration of 200*l.* paid by the plaintiff to the defendant, it was agreed that the defendant should, for the term of fourteen years, purchase of the plaintiff and of no other person, without the plaintiff's consent in writing, all the acids that he should require for the manufacture of muriate or sulphate of ammonia, paying for the same according to the regular course of trade, at the average price of the day, to be ascertained as therein mentioned; and that he should, during the same period, sell to the plaintiff (unless the plaintiff should refuse to purchase the same) all the muriate or sulphate of ammonia which he should manufacture by his said patent processes at the average price of the day, to be ascertained as therein mentioned. Then followed an express covenant on the part of the plaintiff to deliver to the defendant all the acids he might require for his said manufacture, he paying the plaintiff for the same at the average price of the day, to be ascertained as aforesaid, and to pay the defendant for the said muriate and sulphate of ammonia at the rates aforesaid; and a like covenant

[1] Luse *v.* Deitz, 46 Iowa, 205 (plaintiff agreed to sell land which at the time belonged to his wife. This unknown to defendant until a deed signed by both plaintiff and his wife was tendered to him); Ten Eyck *v.* Manning, 52 N. J. Eq. 47, 51 (facts similar to those in preceding case of Luse *v.* Deitz); Chilhowie *v.* Gardiner, 79 Va. 305 (*semble*) *Accord*.

In Dresel *v.* Jordan, 104 Mass. 407, Wells, J., delivering the opinion of the court, said: "The point of the objection is that the seller must have, at the time the agreement is made, such title and capacity to convey, or such means and right to acquire them, as will enable him to fulfil the contract on his part; otherwise the court will not hold the purchaser to a specific performance. But we do not so understand the rule. On the contrary, if the obligation of the contract be mutual, and the seller is able in season to comply with its requirements on his part, to make good the title which he has undertaken to convey, we see no ground on which the purchaser ought to be permitted to excuse himself from its acceptance."

See, to the same effect, in addition to the cases cited *supra*, 347, n. 2, Langford *v.* Pitt, 2 P. Wms. 629; Mortlock *v.* Buller, 10 Ves. 291, 315; Boehm *v.* Wood, 1 J. & W. 421; Hoggart *v.* Scott, 1 R. & My. 293; Salisbury *v.* Hatcher, 2 Y. & C. C. C. 54; Murrell *v.* Goodyear, 1 D. F. & J. 432; Hepburn *v.* Dunlop, 1 Wheat. 179; Brumfield *v.* Palmer, 7 Blackf. 227, 230; Westall *v.* Austin, 5 Ired. Eq. 1; Kindley *v.* Gray, 6 Ired. Eq. 445; Musselman's Ap., 65 Pa. 480, 71 Pa. 465; Lesley *v.* Morris, 9 Phila. 110; Tison *v.* Smith, 8 Tex. 147; Reeves *v.* Dickey, 10 Gratt. 138. — ED.

91 N.W. 913

on the part of the defendant that he would not during the said term use in his manufacture, or purchase of any other persons to be used therein, any acid except acid to be purchased of the plaintiff, without his consent in writing.

After this agreement had been acted on for a considerable time, the defendant refused to abide by it any longer, and proceeded to purchase acids for his manufacture from other persons than the plaintiff; whereupon this bill was filed, praying a specific performance of the agreement, and an injunction to restrain the defendant from purchasing acids elsewhere than from the plaintiff.

The Lord Chancellor in giving judgment said: —

There is a stipulation on the part of Hills that he will supply the acids, and there is a stipulation on the part of Croll that he will purchase acids from Hills and from no other person. Has the court any power to compel Hills to fulfil his part of the agreement? Can the court order him to continue the manufacture of acids, or to purchase them elsewhere, for the purpose of supplying the defendant? It is clear, I apprehend, that the court has no such power. In the case of Coleman *v.* Morris, Mr. Coleman was restrained from writing for any other theatre, the court inferring that that would compel him, or have a tendency to compel him, to write for the Haymarket Theatre: but in this case, the court has no power to compel the plaintiff to supply the defendant with acids, by ordering him not to supply any other person: that is not the agreement, nor was it ever intended that it should be the agreement: therefore it is clear that the court cannot either directly or indirectly compel him to perform his part of the agreement. And it has been laid down again and again, and very recently in a case before Sir Edward Sugden in Ireland,[1] that unless the court can decree specific performance of the whole of a contract, it will not interfere to enforce any part of it. When, therefore, this cause comes to a hearing, the court will not have jurisdiction to restrain the defendant from purchasing acids elsewhere, because it will not be able to compel the plaintiff to furnish all the acids that may be necessary for the manufacture carried on by the defendant.[2] If it

1 Gervaise *v.* Edwards, 2 Dr. & W. 80.

2 In the following cases of valid bilateral contracts the court refused to decree specific performance of the defendant's promise, because a similar decree would not have been granted in a suit by the defendant praying for performance of the plaintiff's promise.

Plaintiff promised to render personal services. — Pickering *v.* Ely, 2 Y. & C. C. C. 249; Johnson *v.* Shrewsbury Co., 3 D. M. & G. 914; Stocker *v.* Wedderburn, 3 K. & J. 393; Ogden *v.* Fossick, 4 D. F. & J. 426; Iron Co. *v.* Western Co., 83 Ala. 498; Cooper *v.* Pena, 21 Cal. 403; Sturgis *v.* Galindo, 59 Cal. 28; King *v.* Gildersleeve, 79 Cal. 504; Wakeham *v.* Barker, *supra*, 87; Richmond *v.* Dubuque Co., 33 Iowa, 422, 486 (*semble*); Buck *v.* Smith, 29 Mich. 166; Alworth *v.* Seymour, 42 Minn. 526.

Plaintiff promised to care for and support defendant. — Chadwick *v.* Chadwick, 121 Ala. 580; O'Brien *v.* Perry, 130 Cal. 526; Ikerd *v.* Beavers, 106 Ind. 483; Denlar *v.* Hile, 123 Ind. 68; Bourget *v.* Monroe, 58 Mich. 563 (compare Hackett *v.* Hackett, 67 N. H. 424).

Plaintiff promised to furnish a company of actors. — Welty *v.* Jacobs, 171 Ill. 624.

Plaintiff's promise too indefinite for specific performance. — Stanton *v.* Singleton, 126 Cal. 657; Ballou *v.* March, 133 Pa. 64.

Plaintiff promised to build or to perform continuous acts. — Waring *v.* Manchester Co., 7 Hare, 482, 492 493; Peto *v.* Brighton Co., 1 H. & M. 468; Blackett *v.* Bates, 1 Ch. Ap.

cannot do this at the hearing, it follows of course that it will not do it in the mean time upon an interlocutory application. The decision of the Vice-Chancellor must therefore be affirmed.[1]

HOWE *v.* WATSON AND OTHERS.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY 22, 1901.

[60 *Northeastern Reporter*, 415.]

HAMMOND, J.[2] The bill prays that the real estate left by the deceased may be decreed as belonging to the plaintiff, and may be conveyed to her by some proper deed, and that the administrator may be ordered to pay over to her the personal property which may remain in his possession after all claims against the estate are satisfied.

The plaintiff says that the deceased offered to give all the property she should leave at her decease to the plaintiff, if she and her daughter would come and stay with the deceased during the remainder of her life; that the plaintiff accepted the offer, and, with her daughter, came and stayed with the deceased as long as she lived.

It is objected that the evidence does not show that the plaintiff

117; Ross *v.* Union Co., 1 Woolw. 26, 36; Lattin *v.* Hazard, 91 Cal. 87; Suburban Co. *v.* Naugle, 70 Ill. Ap. 384; Mastin *v.* Halley, 61 Mo. 196.

Plaintiff's promise, though valid at law, not enforceable in equity on grounds of policy. — Hamilton *v.* Grant, 3 Dow 33; Kennedy *v.* May, 11 W. R. 358 (*semble*).

[1] In Catt *v.* Tourle, 4 Ch. 654, 660, Selwyn, L. J., said: "In my opinion, it is very difficult to reconcile that case [Hills *v.* Croll] with Lumley *v.* Wagner, which has been repeatedly followed, and if Hills *v.* Croll is to stand with that case at all, it can only be upon its peculiar circumstances." In the same case Giffard, L. J., said, p. 662: "With respect to Hills *v.* Croll, that case, as was said by Lord St. Leonards, in his judgment in Lumley *v.* Wagner, was decided according to its peculiar circumstances. Unless it is to be taken as laying down that the court is to refuse to act on a negative covenant wherever there is a correlative obligation which it cannot enforce, it does not apply; if it is taken as going that length, it is contrary to Lumley *v.* Wagner and must be considered as overruled." Further criticisms of Hills *v.* Croll may be found in the Reporter's note to that case, 2 Ph. 62, and, by Lowell, J., in Singer Co. *v.* Union Co., Holmes, 253, 257.

The important distinction between the cases cited in the preceding note and cases like Lumley *v.* Wagner, Hills *v.* Croll, and similar cases in which specific performance of a negative agreement is sought, is pointed out by Sir W. Page Wood, V. C., in Stocker *v.* Wedderburn, 3 K. & J. 393, 404: "With respect to the observations that have been made upon the cases in which injunctions have been granted to restrain the breach of a negative term in an agreement, that this amounts in fact to specific performance of a part of those agreements, upon the plaintiff in the cause agreeing to do all that is requisite on his part, as in Dietrichsen *v.* Cabburn, the distinction in those cases is, that where a person is ordered by injunction to perform a negative covenant of that kind, the whole benefit of the injunction is conditional upon the plaintiff's performing his part of the agreement, and the moment he fails to do any of the acts which he has engaged to do, and which were the consideration for the negative covenant, the injunction would be dissolved. But in this case, if I were to compel the defendants to form themselves into a registered company, I could not afterwards undo that, whatever were to happen. They would have to pay the plaintiff at once 1000*l.*; and when he was in possession of the money, and they were subject to all the liabilities which such a decree as is now asked for would impose upon them, what could the court do if the plaintiff were to refuse to perform his part of the contract?" — ED.

[2] Only so much of the opinion is given as relates to mutuality. — ED.

accepted the proposition made in the letter. The proposition was that the plaintiff should break up her home in Florida, where she was living with her son and daughter, — both of whom, so far as it appears, were unmarried, — and should come with her daughter to Springfield, and stay with her sister as long as the latter should live. The plaintiff, on the reception of the letter, replied at once that she would come just as soon as she could "perfect arrangements, pack my [her] household goods," etc., "as she did not know when, if ever, she would return to Florida." The money to pay her expenses was sent to her by her sister in accordance with the promise contained in the first letter, and, with reasonable dispatch under all the circumstances, the plaintiff, on the 19th day of May, came with her daughter to her sister's house, where she remained until the death of her sister, which occurred about 38 hours after their arrival.

The plaintiff performed her part of the contract. The fact that her sister died so soon seems to us to be immaterial upon the rights of the plaintiff.

The difficult question in this case is whether the plaintiff shall have a decree for specific performance, or whether she shall be relegated to her rights under an action at law. The contract upon its face is not open to the objection that it is not fair and equal. At the time it was made, it could not have been foreseen which party would profit the most by it. The promisor might have lived until her estate was exhausted in her support or otherwise dissipated. Each party assumed the loss or gain by contingencies, and each was willing to do so. There is no evidence of fraud, mistake, or undue influence. The contract must be regarded as fair and equal in its nature, and as voluntarily made. It is true that it is generally laid down that the contract must be of such a nature that the right to specific performance must be mutual. But the exceptions to the rule are numerous, and the principle cannot be controlling and decisive against the plaintiff in a case like this, where, by the nature of the contract, the time for specific performance does not come until the contract is fully performed by the one seeking it, and the contract has been fully performed by such party. While on this the authorities are conflicting (see, for instance, Allen *v.* Cerro Gordo Co.,[1] and Cooper *v.* Pena[2]), we cannot see why, on principle, an actual performance is not as good as an obligation to perform, so far as respects the right to a specific performance; and there are many cases where such relief has been granted in a case like this. See, for discussion of this subject and a collection of the authorities, Pom. Spec. Perf. Cont. §§ 167, 168, and cases cited in the notes thereto. While the question, whether in this case there should be a decree for specific performance, is a question of some difficulty, still, in view of the situation of the parties, their relations to each other, and the moderate size of the estate, we think that the plaintiff can maintain her bill, and that she is entitled to the relief prayed for; and it is so ordered.[3]

[1] 40 Iowa, 349.

[2] 21 Cal. 404.

[3] But see Ramsay *v.* Gleen, 99 N. Ca. 215. UNILATERAL CONTRACTS. — The doctrine

VIOLA McCORMICK *v.* LOUISE STEPHANY AND OTHERS.

IN CHANCERY, NEW JERSEY, NOVEMBER 30, 1898.

[57 *New Jersey Equity Reports*, 257.]

AUGUST STEPHANY by a lease under seal demised to George McCormick a saloon property in Atlantic City, known as the "Extra Dry," and covenanted that if he, the lessor, during the lease should find a purchaser for the property, the lessee should have the option to buy the property for $12,000. The lessee agreed on his part to surrender the premises on three months' notice in case he declined to purchase under his option. The complainant, who was the executrix and sole devisee and legatee of McCormick, elected to buy the property under the option, and upon the refusal of the defendants, the widow and heirs of Stephany, to sell it, brought this bill for specific performance of the contract.[1]

GREY, V. C. . . . It is objected by the defendants that this clause giving the privilege to demand the conveyance is unilateral and without consideration. If this clause is considered separately it does appear to be unilateral and states no specific consideration. But it forms part of the lease which is signed by both parties, and is under their seals, which import a consideration. The later decisions appear to have established the rule that where an option to purchase is proffered in a lease of lands, there is a sufficient consideration, as the privilege must be treated as part of the lease, operating as an inducement to its acceptance by the lessee, and to the agreement to pay rent reserved. In such cases specific performance will not be refused in equity because the agreement is unilateral or without consideration.[2]

of mutuality is obviously inapplicable to unilateral contracts. Palmer *v.* Scott, 1 Russ. & M. 391; Turner *v.* Noy, 32 L. T. Rep. 56; Wilkes *v.* Ga. Co., 79 Ala. 180; Davis *v.* Williams, 121 Ala. 542; Spires *v.* Urbahn, 124 Cal. 110; Frue *v.* Houghton, 6 Colo. 318; Perkins *v.* Hadsell, 50 Ill. 216; Western Co. *v.* Babcock, 6 Met. 346; Welch *v.* Whelpley, 62 Mich. 15; Seager *v.* Burns, 4 Minn. 141; Boyd *v.* Brown (W. Va. 1899), 34 S. E. R. 907.

PERFORMANCE OF PLAINTIFF'S PROMISE BEFORE BILL FILED. — If a plaintiff has performed his promise, although not compellable in equity to do so, the objection of want of mutuality disappears, and he may obtain a decree for the performance of the defendant's promise. Decrees were given in the following cases in which the plaintiffs had performed their promises: —

To render personal services. — Ballard *v.* Carr, 48 Cal. 74; Howard *v.* Throckmorton, 48 Cal. 482; King *v.* Gildersleeve, 79 Cal. 504, 510 (*semble*); Thurber *v.* Meves, 119 Cal. 35; Lindsay *v.* Warnock, 93 Ga. 619; Denlar *v.* Hile, 123 Ind. 68; Allen *v.* Cerro Gordo Co., 40 Iowa, 349; Topeka Co. *v.* Root, 56 Kan. 187.

To erect buildings. — Wilkinson *v.* Clements, 8 Ch. 96; Lane *v.* May Co., 121 Ala. 296. — ED.

[1] The statement of the case is much condensed, and only so much of the opinion is given as relates to the question of specific performance. — ED.

[2] Lawes *v.* Bennett, 7 Ves. 436 cited, *supra*, 200, cited; Weeding *v.* Weeding, 1 J. & H. 424; Ranelagh *v.* Milton, 2 Dr. & Sm. 278 (*semble*); Willard *v.* Tayloe, 8 Wall. 557; Davis *v.* Robert, 89 Ala. 402; Laffen *v.* Naglee, 9 Cal. 662; De Rutte *v.* Muldrow, 16 Cal. 505; Hall *v.* Center, 40 Cal. 63; Clark *v.* Clark, 49 Cal. 586; Perry *v.* Paschal, 103 Ga. 134 (option enforced by assignee); Hayes *v.* O'Brien, 149 Ill. 403; Sauffrain *v.* McDonald, 27 Ind. 269;

Hawralty *v.* Warren;[1] Page *v.* Martin;[2] Ten Eyck *v.* Manning;[3] Waters *v.* Bew.[4]

Herrman *v.* Babcock, 103 Ind. 461; Bank *v.* Baumeister, 87 Ky. 6; Bacon *v.* Ky. Co., 95 Ky. 373; Stansbury *v.* Fringer, 11 Gill & J. 149; Maughlin *v.* Perry, 35 Md. 352 (option enforced by assignee against assignee); Schroeder *v.* Gemeinder, 10 Nev. 355; Hawralty *v.* Warren, 18 N. J. Eq. 124; Page *v.* Martin, 46 N. J. Eq. 585 (option enforced against assignee); Waters *v.* Bew, 52 N. J. Eq. 787; Madison Ass'n *v.* Brittin, 60 N. J. Eq. 160; *In re* Hunter, 1 Edw. 1 (option exercised after death of giver); Kerr *v.* Purdy, 50 Barb. 24 (reversed on facts in 51 N. Y. 629); Longworth *v.* Mitchell, 26 Oh. St. 334 (option exercised after death of giver); House *v.* Jackson, 24 Oreg. 89; Kerr *v.* Day, 14 Pa. 112 (option enforced by assignee against assignee); D'Arras *v.* Keyser, 26 Pa. 249; Napier *v.* Darlington, 70 Pa. 64 (option enforced against assignee); Newell's Ap., 100 Pa. 513; People's Co. *v.* Spencer, 156 Pa. 85 *Accord.*

Option to renew a lease. — The right to demand specific performance of a lessor's contract to renew the lease at the option of the lessee is well established. Hersey *v.* Gibbett, 18 Beav. 174; Moss *v.* Barton, L. R. 1 Eq. 474. A full collection of the numerous English and Irish decisions will be found in Professor Lewis's learned discussion of the "Defence of Lack of Mutuality" in 40 Am. L. Reg. 387–393. The American cases are few. Only the following have been found: Pullman Co. *v.* Texas Co., 4 Woods, C. C. 317 (option with lessor); Buhl *v.* Stevens, 84 Fed. Rep. 922 (renewal of license to use patent); Monihan *v.* Wakelin, (Arizona, 1899) 56 Pac. R. 735; Hall *v.* Center, 40 Cal. 63, 68 (*semble*); Thompson *v.* Scaver, 91 Ill. Ap. 500; Gannett *v.* Albree, 103 Mass. 372 (*semble*); Floyd *v.* Storrs, 144 Mass. 56; McKibbin *v.* Brown, 14 N. J. Eq. 13 (*semble*). — Ed.

1 3 C. E. Gr. 126.

2 1 Dick. Ch. 585.

3 7 Dick. Ch. 50.

4 7 Dick. Ch. 791.

Similarly if one for a dollar, or any other consideration however slight, gives another the option of buying or selling land, the holder upon exercising it may enforce specific performance against the promisor. Brown *v.* Slee, 103 U. S. 828; Waterman *v.* Waterman, 27 Fed. R. 827; Johnston *v.* Trippe, 33 Fed. R. 530; Watts *v.* Kellar, 56 Fed. R. 1; Ross *v.* Parks, 93 Ala. 153 (in consideration of fifty cents, — option enforced against assignee); Calanchini *v.* Branstetter, 84 Cal. 249 (option enforced by assignee against assignee); Sayward *v.* Houghton, 119 Cal. 545; Byers *v.* Denver Co., 13 Colo. 552; Estes *v.* Furlong, 59 Ill. 298; Guyer *v.* Warren, 175 Ill. 328; Bacon *v.* Ky. Co., 95 Ky. 373, 377 (*semble*, explaining, if not overruling Boucher *v.* Van Buskirk, 2 A. K. Marsh. 345, and Litz *v.* Goosling, 93 Ky. 185); Coleman *v.* Applegarth, 68 Md. 21 (*semble*, in consideration of $5, — option enforced against assignee — but see *contra*, Rider *v.* Gray, 10 Md. 282); Hollman *v.* Conlon, 143 Mo. 369 (*semble*); Rice *v.* Gibbs, 33 Neb. 460, 40 Neb. 264 (in consideration of $5); Laning *v.* Cole, 4 N. J. Eq. 229; Van Doren *v.* Robinson, 16 N. J. Eq. 256; Reynolds *v.* O'Neil, 26 N. J. Eq. 223; Woodruff *v.* Woodruff, 44 N. J. Eq. 349; Dynan *v.* McCulloch, 46 N. J. Eq. 11, 608; Corson *v.* Mulvany, 49 Pa. 88; Smith's Ap., 69 Pa. 474 (in consideration of $5, — option enforced by assignee); Clarno *v.* Grayson, 30 Oreg. 111; Bradford *v.* Foster, 87 Tenn. 4; Donnally *v.* Parker, 5 W. Va. 301 (approved in Weaver *v.* Burr, 31 W. Va. 736, 758); Barrett *v.* McAllister, 33 W. Va. 738 (option enforced against assignee) *Accord.*

Bromley *v.* Jeffries, 2 Vern. 415 (*semble*) *Contra.*

In Newton *v.* Newton, 11 R. I. 390 the option was regarded as strictly personal.

An indefinite option violates the rule against perpetuities. London Co. *v.* Gomm, 20 Ch. Div. 562 (overruling Birmingham Co. *v.* Cartright, 11 Ch. D. 432). — Ed.

CORNELIUS O'BRIEN *v.* NICHOLAS BOLAND.

SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER 2, 1896.

[166 *Massachusetts Reports*, 481.]

BILL in equity, filed in the Superior Court for a specific performance of an agreement to sell a block of uncompleted tenement houses.

BARKER, J.[1] The offer was made on Saturday, December 2, 1893, and the withdrawal on the following Monday. When the offer was withdrawn, it had not been accepted. Four days afterwards the plaintiff's attorney wrote to the defendant that the plaintiff would purchase in accordance with the offer.

The offer was to sell at any time within ten days a block of uncompleted tenement houses, to finish them, and to guarantee them free from all lien or encumbrance, except a mortgage for ten thousand dollars, and, further, to give a good bond in the penal sum of twenty thousand dollars for the performance of the defendant's agreements. The defendant could not furnish such a bond.

The defendant contends that, because he could not have compelled the plaintiff to buy before the acceptance of December 8, there is a want of mutuality which should defeat the bill. We enforce specifically contracts assented to by both parties, and further acted upon by the plaintiff, even when he has given only a verbal assent, and but for the offer in his bill could not be held to perform on his own part. Old Colony Railroad *v.* Evans;[2] Dresel *v.* Jordan;[3] Slater *v.* Smith;[4] Mansfield *v.* Hodgdon.[5] Whether we should specifically enforce a contract upon which the plaintiff has not acted except to give a mere assent, which would not enable the defendant to enforce the contract against him, it is not necessary to discuss. See Putnam *v.* Grace.[6] In the present case, because the offer was under seal, it was an irrevocable covenant, conditional upon acceptance within ten days, and the written acceptance within that time made it a mutual contract which the plaintiff can enforce. Mansfield *v.* Hodgdon, *ubi supra*. See, also, Clark, Con. 47; Lawson, Con. § 12; Pomeroy, Spec. Perf. § 169. The plaintiff might have assented to the withdrawal, and the offer would have been at an end. Ballou *v.* Billings.[7] But he was not bound to assent, and could treat the withdrawal as inoperative. If he elected so to treat it, he should accept the covenant and await some further breach. Daniels *v.* Newton.[8] The withdrawal, if itself a breach, was only one step toward the situation which would enable the plaintiff to ask for specific performance in a court of equity.

In this view of the case, it is unnecessary to consider whether there was a waiver of the withdrawal.

1 Only so much of the opinion is given as relates to the question of mutuality. — ED.
2 6 Gray. 3 104 Mass. 407, 412. 4 117 Mass. 96.
5 147 Mass. 304 6 161 Mass. 237, 247. 7 136 Mass. 307, 309.
8 114 Mass 530.

The result is that the plaintiff may have such specific performance as is now possible. The terms of the decree will be settled in the Superior Court.[1]

So ordered.

BOREL AND OTHERS *v.* MEAD AND OTHERS.

SUPREME COURT, NEW MEXICO, JANUARY TERM, 1884.

[3 *New Mexico Reports*, 84.]

AXTELL, C. J.[2] This is a case of an option or what is sometimes called bonding a mine. The owners of the mine, defendants herein, desiring to sell their mine, entered into a written agreement, in form of a penal bond, with plaintiffs, that upon payment by them to defendants at a future day, of a stipulated sum of money, defendants would convey to plaintiffs their mine. This agreement is in writing, is certain and fair in all its parts, is capable of being performed, and is under defendants' hand and seal. Plaintiffs signed no agreement. Upon the day stipulated in said agreement, plaintiffs tendered the sum of money agreed upon and demanded the mine; defendants declined the money, and refused to comply with their agreement. Plaintiffs bring this suit in equity, and ask the court to enforce the contract. Defendants demur to plaintiffs' bill for want of equity and set up as specific ground of demurrer that the bill does not show upon its face what the consideration was, if any, that defendants had or were to receive for entering into the contract to convey; also that there was no mutuality; that the contract was unilateral; that defendants alone were bound. The court sustained the demurrer, and plaintiffs appealed.

To the first point it is sufficient to say the contract, being under seal, imports a consideration; to sustain the demurrer on the ground that there was not a valuable consideration was not only assuming the fact, but also depriving the plaintiffs of an opportunity of proving a consideration. The contract being under seal, we must presume that there was a valuable consideration till the contrary is shown. The court, in sustaining the demurrer, prevented the plaintiffs from doing this.[3]

As to the second point, the condition of mutuality is, in general, sufficiently satisfied if there be any consideration of the one side as well as the other. It is also held that a court of equity, in actions for the specific performance of optional contracts and covenants to

1 Crandall *v.* Willig, 166 Ill. 233 (*semble*); Graybill *v.* Brugh, 89 Va. 895 *Contra*. See Potts *v.* Whithead, 20 N. J. Eq. 55, 57. — ED.

2 The concurring opinion of BELL, J., and the dissenting opinion of BRISTOL, J., are omitted. — ED.

3 Mills *v.* Larrance, 186 Ill. 635 *Accord*. But this doctrine is justly criticised in 14 Harv. L. Rev. 387. See also Mayger *v.* Cruse, 5 Mont. 485. — ED.

lease and convey lands, will enforce the covenant, although the remedy is not mutual, provided it is shown to have been upon a fair consideration. So it is also held not to be necessary to the specific performance of a written agreement that it should be signed by the party seeking to enforce it. If the agreement is certain, fair, and just in all its parts, and signed by the party sought to be charged, that is sufficient. The want of mutuality is no objection to its enforcement. The very nature of an option is unilateral; one party has property to sell, the other has only, perhaps, ability to make sales. The skill and ability of the one is the consideration which induces the other to bond the mine. If the agreement is fair in every respect, and neither party was deceived in making it, there can be no objection to enforcing it. There is certainly sufficient mutuality to support it, if we take the facts, as stated in the bill, to be true, and this the demurrer does.[1] See 5 Wait's Act. & Def. 788, and authorities there cited.

We are of opinion that the court below erred in sustaining the demurrer, and the case is remanded for further action in accordance with this opinion.

J. F. RUST AND OTHERS *v.* C. F. CONRAD AND OTHERS.

SUPREME COURT, MICHIGAN, JANUARY TERM, 1882.

[47 *Michigan Reports*, 449.]

COOLEY, J.[2] This is a bill for the specific performance of what is called in the mining districts a contract of option. [By the contract, in consideration of successful explorations for iron ore to be made by the plaintiffs upon lands of the defendants, the latter agreed to grant a twenty years' lease of the lands for mining purposes to the plaintiffs, who were to pay taxes and certain royalties upon the ore mined and shipped. The plaintiffs were also to have the right to terminate the lease upon thirty days' notice.][3]

The defendants rely upon a principle of law as constituting a complete bar to the relief claimed. This principle may be stated as follows: The contract was not such an one as a court of equity will specifically enforce. By its terms the lease to be given under it might at any time be terminated by the lessees, as to the whole land or any part of it not less than eighty acres, on their giving thirty days' notice of intention so to do. The continuance of the lease, if one should be given, would therefore depend on the will of the lessees, who might immediately elect to terminate it. The contract therefore lacks mu-

[1] O'Fallon *v.* Kennerly, 45 Mo. 124 (*semble* — but see Davis *v.* Petty, 147 Mo. 374) *Accord.* — ED.

[2] Only so much of the opinion is given as relates to the question of mutuality. — ED.

[3] This summary of the contract is substituted for the contract given *in extenso* in the report. — ED.

tuality and equality; and not being mutual or equal, lacks equity, and for that reason should not be enforced.

When a party to a contract appeals to a court for its specific performance, he addresses himself to the judicial discretion. The relief he asks is altogether exceptional, for the general rule is that the party who complains that another has failed to fulfil his engagements, is supposed to have adequate redress at law in recovery of damages. The court may therefore refuse to grant specific performance in any case where in its judgment equity does not require it. McMurtrie *v.* Bennette;[1] Smith *v.* Lawrence;[2] Blanchard *v.* Detroit, etc., R. R. Co.;[3] Berry *v.* Whitney;[4] Willard *v.* Tayloe; Williams *v.* Williams;[5] Mather *v.* Simonton.[6] In a few cases a party is suffered to invoke this extraordinary jurisdiction of a court of equity, when it is manifest that the remedy at law is inadequate.

But when a party comes into equity it should be very plain that his claim is an equitable one. If the contract is unequal; if he has bought land at a price which is wholly inadequate; if he has obtained the assent of the other party to unreasonable provisions; if there are any indications of overreaching or unfairness on his part, the court will refuse to entertain his case, and turn him over to the usual remedies. Chambers *v.* Livermore;[7] Munch *v.* Shabel;[8] Mississippi, etc., R. R. Co. *v.* Cromwell;[9] Burton *v.* Le Roy.[10] If, for example, the contract is so drawn that the vendor has the option to retain the property or to convey it, performance in his behalf will be refused. Maynard *v.* Brown.[11] And in each case the court will consider "whether, in view of all the facts and those doctrines which are interwoven with the very texture of equity jurisprudence, and in view of the specific peculiarities presented, and the settled principles and maxims of the court, it is right and proper to entertain the case and administer relief." Buck *v.* Smith.[12] These are familiar principles.

But the court will also refuse to interfere in any case where, if it were to do so, one of the parties might nullify its action through the exercise of a discretion which the contract or the law invests him with. The refusal in such a case does not depend of necessity upon any illegality, inequality, or unfairness, but it is sufficiently based upon the impropriety of imposing on the judge the labor, and on the public the expense of an investigation of disputes when the circumstances are such as to preclude any judgment that may be rendered from being final. No court can with reason be called upon to do a vain thing. A familiar instance is that of a contract for the formation of a partnership, which, though it is within the power of the court to enforce it, and it may be done under special circumstances when by its terms the partnership is to continue for a definite period, yet in the absence of a provision to that effect performance will invariably

1 Har. Ch. 124. 2 15 Mich. 499. 3 31 Mich. 43. 4 40 Mich. 65.
5 50 Wis. 311. 6 73 Ind. 595. 7 15 Mich. 381. 8 37 Mich. 166.
9 91 U. S. 643. 10 5 Sawy. 510. 11 41 Mich. 298. 12 29 Mich. 166, 170.

be refused, though the terms be in all respects equal, fair, and legal. The reason is that the partnership which the court might establish by its decree, the parties or either of them might immediately dissolve; and Lord Eldon says "no one ever heard" of the court executing an agreement under such circumstances. Hercy *v.* Birch.[1] See also Scott *v.* Rayment;[2] Meason *v.* Kaine;[3] Coll. on Part. 19, 385; Story on Part. § 189; Pars. on Part. 298; Fry on Spec. Perf. 64, 504; Story, Eq. Jur. § 666.

All contracts where the party has reserved to himself, or where the law gives him the authority to render nugatory any decree that ought to be rendered in their enforcement, rest upon the same principle.[4] This was recognized in Marble Co. *v.* Ripley;[5] and more distinctly asserted and decided in Express Co. *v.* Railroad Co.[6] In this last case the very strong assertion is made that "a court of equity never interferes where the power of revocation exists."

It is urged on the part of the complainants that the recognition and enforcement of these contracts of option is absolutely essential to the development of the mineral resources of the state; and it may be and probably is the fact that they perform a convenient and useful function. But it does not follow from that fact that the party must have this specific remedy. He is supposed to rely upon his right to an action for the recovery of damages in all cases where it is not consistent with the principles of equity that he should have other redress. Denying specific performance does not deny the legality or obligation of the contract: it denies merely that the case is one of equitable cognizance.

The decree must be reversed and the bill dismissed with costs of both courts.[7]

The other justices concurred.

[1] 9 Ves. 357. [2] L. R. 7 Eq. Cas. 112. [3] 63 Penn. St. 335.

[4] Wheeler *v.* Trotter, 3 Sw. 174, n.; Jones *v.* Jones, 12 Ves. 188 (*semble*); Express Co. *v.* R. R. Co., 99 U. S. 191; Glass *v.* Rowe, 103 Mo. 513 *Accord.* — Ed.

[5] 10 Wall. 339, 359.

[6] 99 U. S. 191.

[7] Marble Co. *v.* Ripley, 10 Wall. 339 (*semble*); Iron Co. *v.* Western Co., 83 Ala. 498, 509 (*semble*); Sturgis *v.* Galindo, 59 Cal. 28; Harrisburg Club *v.* Athletic Ass'n, 8 Pa. Co. Ct. R. 337, 342 *Accord.*

But the decision in Rust *v.* Conrad was thought to be so injurious to the development of the mineral wealth of Michigan that the legislature in the following year gave to the holder of an option for a mining lease an absolute right to have such option or agreement specifically enforced in chancery. Grummett *v.* Gingrass, 77 Mich. 369, 388. — Ed.

THE SINGER SEWING MACHINE CO. *v.* THE UNION BUTTON-HOLE AND EMBROIDERY CO.

CIRCUIT COURT, UNITED STATES, FIRST CIRCUIT, SEPTEMBER, 1873.

[*Holmes*, 253.]

THE bill alleged that the defendant company was, in 1866, the owner of certain patented inventions embodied in a machine for making button-holes, and owned a factory, &c., for making the machines; and that, being desirous to bring the same into notice and to secure a market, they made a contract with the complainant, then a corporation of established reputation and large business in this country and in foreign countries, by which the complainant was to be the sole and exclusive agent for the sale of these machines, excepting in France and the city of Boston, and was to supply the market and to use certain means and facilities at its command for this purpose; and the defendant company was to furnish the complainant with machines, as called for, up to the full capacity of the factory, at a certain agreed price to be paid monthly in cash. It further charged that the complainant had bought and paid for one thousand machines, and had succeeded, with much labor and expense, exceeding the profit obtained, in selling these machines; and that a market had been made mainly, if not wholly, by its exertions; that the defendant company now neglected and refused to deliver any more machines, though requested; and were taking measures to dissolve their association for the purpose of avoiding their contract with the complainant, and in pursuance of that intent had conveyed the patents to the defendant Wood, as trustee for a voluntary and unincorporated body of persons unknown, called the Button-hole Sewing-Machine Company; that said Wood had been the treasurer of the defendant company, and was fully informed of the complainant's rights. The prayer of the bill was for a decree for specific performance; and an injunction against the transfer of the patents by Wood, and against the dissolution of the defendant company, and the manufacture and sale of the machines excepting in conformity with the contract.

The agreement between the complainant and defendant companies contained this clause: "That the agency aforesaid shall continue so long as the patent or patents for said machine have been or may be granted or extended, provided that the Singer Manufacturing Company shall fairly and reasonably conduct such agency, and shall continue to supply the market with machines as aforesaid, and shall not engage in selling any other button-hole machines than those manufactured by the Union Button-hole and Embroidery Machine Company; but in case the Singer Manufacturing Company shall fail to carry out their agreements as herein expressed, the forfeiture of such agency shall be considered the only penalty for such failure."

Lowell, J.[1] But it is said to be fatal to the complainant's case that the contract is not a mutual one. This want of mutuality is found in the article which limits the penalty for a forfeiture on the complainant's part to a mere loss of the agency. This is said to be equivalent to an agreement that the complainant may renounce at any time; and so it is argued that only one party is bound to this agreement. It is no doubt true, in general, that where only one side is bound to an agreement which remains wholly executory, a court of equity will not usually interfere to enforce the agreement against the party who is bound. The simplest case of this kind is where an infant is one party to a contract for the sale of land. The reason given is, that the party who is not bound would enforce the contract if for his advantage, and repudiate it if the contrary. Lawrenson *v.* Butler.[2] The doctrine is often invoked in that class of cases. But there are innumerable cases where the party seeking performance is no longer bound to anything, having paid the consideration in the outset, or performed his part, or where the plaintiff does not rest on a contract wholly executory, to which this doctrine does not apply. I have some doubt of its application to this case. Supposing the stipulation to mean, what the defendants contend it does, that the complainant may renounce at any time, which may be doubted, still, if the defendants, for valuable considerations, have given the complainant an exclusive license until it forfeits it, I do not see why a court of equity should not protect that license by its injunction, as usual, so long as it is not forfeited. A very strong case was cited from 10 Wall., in which the Supreme Court refused to decree the specific performance of a contract for quarrying marble, &c., on the ground, among several others, that the plaintiff had the right to give up the arrangement on a year's notice. I cannot think that the court intended to announce any general proposition that they would never enforce a contract which one party had a right to put an end to in a year. Everything must depend upon the nature and circumstances of the business. In many of the cases that I have cited, the plaintiff had it in his power to end the contract. It is certainly competent to the parties to make a contract which will be equitable and reasonable, and in which their rights ought to be protected while they last, though it may be terminable by various circumstances, and though one party may have the sole right to terminate it, provided their stipulation is not one that makes the whole contract inequitable. In the note which I have above referred to in the case of Hills *v.* Croll, the learned reporter thinks it quite clear that a contract by the defendant to buy all his acid of the plaintiff, so long as the plaintiff chose to deal with him, would be valid, and would be enforced by injunction. In Rolfe *v.* Rolfe,[3] the Vice-Chancellor notices the fact that the plaintiff could stop

[1] The argument for defendants is omitted and only so much of the opinion is given as relates to the question of mutuality. The court discussed and approved the doctrine of Lumley *v.* Wagner. — Ed.

[2] 1 Sch. & Lef. 13.

[3] 15 Sim. 88.

his own business when he chose, and thereby deprive the defendant of the employment agreed on, yet he restrained the defendant in the mean time from working for a stranger.

The remedy by injunction is a very elastic and adaptable one, and there is no sort of difficulty in granting it, until, by a change of circumstances, it shall appear that it ought to be dissolved. A bill may be retained for that purpose for any number of years that may be requisite. The argument, to be sound, must go this length, that, after the complainant has ordered a thousand machines, and paid for them, and is selling them in all the countries of the world excepting France, there is no adequate remedy against the defendants' underselling in all those markets. I do not mean to be understood that this point would not apply to an injunction bill as well as to one for specific performance, nor that it is not a doubtful one. But the contract contains in itself, as we have seen, not only executory agreements on both sides, but a present grant, for value, of the exclusive right to sell; and my present impression is that such a grant is good, and is to be enforced, so long as it lasts, whether the remainder of the contract is mutual or not, provided the whole contract, including the grant, is not so unequal as to be void in a court of equity, which, as at present advised of the facts, I see no reason to hold.

It seems to me, therefore, that the complainant's case has a sufficient appearance of justice to require the court to keep things as they are, by restraining all conduct which will put it out of the power of the defendants to fulfil their contract, until the facts and law can be fully ascertained.

Injunction ordered.[1]

SMITH *v.* GARLAND.

In Chancery, before Sir W. Grant, M. R., February 20, 1817.

[2 *Merivale*, 123.]

By agreement in writing, signed by both parties, Smith contracted to sell and Garland to purchase an estate which was freehold of inheritance, in consideration of £1700, to be paid on executing the conveyance. The bill was for a specific performance of this agreement by the defendant, the purchaser. The defendant resisted the bill on the ground that the plaintiff, before the agreement, had made a voluntary settlement of the property.[2]

The Master of the Rolls (stopping the reply). The cases referred to are cases in which the purchaser was plaintiff, and are altogether different from a case where the settlor comes into this court for the purpose of defeating his own settlement. A purchaser has in

[1] Rolfe *v.* Rolfe, 15 Sim. 88 *Accord.* — Ed.

[2] The statement of the case is condensed, and the arguments omitted. — Ed.

equity the same rights as at law, under the statute; and the voluntary settlement, as against him, cannot stand. But the party who made the settlement has no right to disturb it. As against himself, it is valid and binding. A court of equity remains neutral with respect to it. It will not impede the sale by which he seeks to get rid of it, as was decided by the Lord Chancellor in the case of Pulvertoft *v.* Pulvertoft,[1] but neither will it assist him. It will not interfere in any manner respecting it.

In this case there is no party before the court who is an object of the provisions of the statute. The vendor is not within the contemplation of the statute. The purchaser might claim the benefit of it; but he does not — he repudiates it. As between the settlor and the objects of the settlement, it is a perfectly binding settlement; and the plaintiff has no ground whatever for the relief he prays.

Exception allowed. Bill dismissed, without costs.[2]

[1] 18 Ves. 84.

[2] Johnson *v.* Legard, T. & R. 281; Clarke *v.* Willett, L. R. 7 Eq. 313; *In re* Briggs, 1891, 2 Ch. 127 *Accord*.

The purchaser, on the other hand, may compel specific performance by the vendor. Buckle *v.* Mitchell, 18 Ves. 100; Rosher *v.* Williams, 20 Eq. 210.

In accordance with the doctrine of the principal case, a defendant may be compelled to perform his side of a bilateral agreement, although, because of his fraud or disregard of his duty as a fiduciary, he may not be able to obtain similar relief againt his promisor. *Ex parte* Lacey, 6 Ves. 625; see, further, to the same effect: South Eastern Co. *v.* Knott, 10 Hare, 122; Hawkes *v.* Eastern Co., 1 D. M. & G. 737, 755, 5 H. L. C. 331, 365. But see Bodine *v.* Glading, 21 Pa. 50.

Similarly, a vendor who cannot have equitable relief against the buyer, because of the incompleteness of his title, may, nevertheless, be compelled to convey, sometimes making and sometimes without making compensation to the buyer for the deficiency. *Supra*, 248, n. 2; 251, n. 1; 253, n. 2, paragraph 4; see, particularly, Sutherland *v.* Briggs, 1 Hare, 26, 34, and *supra*, 256, last paragraph of note. — Ed.

CHAPTER III.

BILLS FOR AN ACCOUNT.[1]

DINWIDDIE *v.* BAILEY.

BEFORE LORD ELDON, C., JUNE 17, 1801.

[6 *Vesey*, 136.]

THE bill stated that the plaintiff carried on the business of insurance broker at Manchester; and was employed by the defendants from time to time to effect insurances upon ships, goods, wares, and merchandise; and paid divers sums of money on account thereof; and became entitled as such insurance broker to divers sums of money for his commission upon effecting such insurances, and otherwise respecting the same, and the money received on account thereof, and for postage of letters, and upon sums of money paid, laid out, and expended, on account of the defendants in effecting the insurances, etc.; and that the defendants were also indebted in divers sums of money upon promissory notes endorsed to the plaintiff in the usual course of business.

The bill further stated that the plaintiff received some money from the underwriters in respect of losses upon some ships.

The bill then stated losses upon ships under insurances effected by the plaintiff for the defendants; one settled upon the 7th, another upon the 11th of October, 1800, which according to the said custom would be payable three months from the 7th and 11th of November; that no account of the said dealing was stated between the plaintiff and defendants, but an action was brought by the defendants in December, in which they held the plaintiff to bail for 1192*l.* 5*s.* 11*d.*, though the money due in respect of the said losses was not due until February, and the defendants had not drawn upon the plaintiff; and the defendants at the time of the action brought were, and now are, indebted to the plaintiff in a much larger sum on the accounts before mentioned and also by virtue of three promissory notes, one, dated the 19th of October, 1799, at twelve months after date, for 600*l.*; another of the same date and for the same time for 650*l.*; another, dated the 18th of November, 1799, at fifteen months after date, for 1440*l.* 16*s.*, all endorsed to the plaintiff; and on account a large bal-

[1] The proceedings in the common law action of account are set forth fully in Godfrey *v.* Saunders, 3 Wils. 94. A late instance of this obsolete action is to be found in Baxter *v.* Hozier, 5 Bing. N. C. 288, 7 Scott, 233 S. C. — ED.

ance will be found due to the plaintiff. The bill then stated applications for the sums paid for premiums, commission, etc.; that the defendants threaten to proceed to trial, well knowing that the plaintiff cannot obtain adequate justice in the said action without an account, and cannot recover therein the balance due to him from them, as aforesaid; and prayed an account of the sums of money paid by the plaintiff for and on account of the defendants in respect of the insurances effected, also the money due to him for commission and otherwise respecting the same, and the money received on account thereof, postage of letters, and the other sums of money paid, laid out, and expended by him on their account about the same, and also an account of the money due to him in respect of the promissory notes, of the several sums of money he received from the underwriters or others on account of the losses, and all other sums due to them from him; and a decree for payment; offering to pay what shall be due from him; and an injunction to restrain proceedings at law.

The defendants put in a general demurrer to the discovery and relief.[1]

The Lord Chancellor. I should feel infinite reluctance in supporting such a bill. It contains rather a statement of facts, the effect of which it is a little difficult to collect. With regard to all these allegations, some of which import that he has received some, that he has paid, money, he does not go on to allege that upon the effect of the whole, taken together, they are indebted to him. The only allegation of debt that I can find is with regard to the money due upon the promissory notes. He alleges further that these promissory notes form a counter-demand; and upon the whole alleges that a considerable sum of money is due to him; and in the sense in which such words are used, the bill must be taken to be true.

It is clear this case might be disposed of altogether at law. It is another question whether the jurisdiction of this court might not attach upon it: but it is beyond all doubt it might be disposed of at law; for every fact alleged is a fact, with regard to which it is impossible that the plaintiff must not be in possession of proof. He must know what he paid for premiums of insurance, for postage; what was due to him for commission, which is settled by the law and usage of merchants, unless there is a special agreement, which is not alleged. All these particulars are known to himself. If an action was brought, therefore, he would have had only to prove what is here stated; which would be easy. He has a set-off, the ordinary case of set-off of a sum of money, which he says is not only equal to their demand, but gives him a right to sustain himself as a plaintiff for the balance due to him. It is not to be said that in every case where the defendant owes more to the plaintiff, that is a ground for a bill. There must be mutual demands forming the ground. The case of dower is always considered a case standing upon its own specialties. So is the case of the steward. The nature of his dealing is

[1] The arguments of counsel are omitted. — Ed.

that money is paid in confidence, without vouchers, embracing a great variety of accounts with the tenants, and nine times in ten it is impossible that justice can be done to the steward. If I sustain this bill, there never would be an action in the city against a broker without a bill in equity. I hesitate excessively in permitting such a bill; and the strong inclination of my opinion is that the demurrer ought to be allowed. I feel great sanction for the doubt I entertain from the opinion of Lord Chief Justice EYRE in the case cited:[1] a judge whose habit was not to express doubts where he had a clear opinion. That case is very different, as being the case of an executor upon payments made to his testator, not of the party himself coming for relief. The executor can only go upon conjecture as to the amount of the money paid; and therefore would go to law completely at his peril. There is hardly a case of set-off in which a bill might not be sustained if this may.

June 17th. The cause having stood over for the purpose of searching for precedents, *Mr. Agar* said, there were numerous cases of accounts sought by a principal against a factor, and one upon the bill of the factor against the principal, Chapman *v.* Derby,[2] which was disposed of upon another point: but he could not find any case of an insurance broker.

THE LORD CHANCELLOR said it was impossible to sustain the bill, without laying down that wherever a person is entitled to a set-off, he may come into this court.

The demurrer was afterwards allowed.[3]

MACKENZIE *v.* JOHNSTON, MEABURN AND OTHERS.

BEFORE SIR JOHN LEACH, V. C., JUNE 29, 1819.

[4 *Maddock*, 373.]

THE bill stated that in April, 1817, the plaintiff, then a partner with one Vigurs, since a bankrupt, entered into an agreement with the defendants, Johnston and Meaburn, the owners of a vessel called

1 Wells *v.* Cooper, in the Court of Exchequer, 1791, MSS.

2 2 Vern. 117.

3 A bill by an agent, praying an account of the transaction between him and his principal, was dismissed in the following cases: Parry *v.* Owen, 3 Atk. 740, Amb. 109 s. c.; Frietas *v.* Dos Santos, 1 Y. & J. 574; Allison *v.* Herring, 9 Sim. 533; Padwick *v.* Hunt, 18 Beav. 575; Smith *v.* Leveaux, 2 D. J. & S. 1; Badger *v.* McNamara, 123 Mass. 117; Lynch *v.* Willard, 6 Johns. Ch. 342; McCullough *v.* Pence, 85 Hun, 271; Chauvant *v.* Maillard, 56 N. Y. Ap. Div. 11; Skilton *v.* Payne, 18 N. Y. Misc. Rep. 332; Johnston *v.* Berlin, 35 N. Y. Misc. Rep. 146.

In the following cases the agent maintained a bill for an account against his principal because of the complication of the transactions: Mitchell *v.* Great Works Co., 2 Story, 648; Fenno *v.* Primrose, 116 Fed. R. 49; Ludlow *v.* Simond, 2 Cai. Cas. 1; Wilson *v.* Mallett, 4 Sandf. 112; Kerr *v.* Camden Co., Cheves, Eq. 189 (reciprocity of remedy deemed important). — ED.

the Jemima, about to sail for the East Indies, to ship a quantity of earthenware to Bombay, to be there sold by their agents on their account; and that the defendants should advance to the plaintiff and his then partner 275*l.* 1*s.* 6*d.* on the credit of the shipment; and that the money produced by the sale of the goods in India, after deducting the necessary expenses incident to such adventure, and the said sum of 275*l.* 1*s.* 6*d.* should be paid over to the plaintiff and his partner by the defendants; that the shipment was accordingly made and was consigned by the defendants, Johnston and Meaburn, to their agents at Bombay; that the partnership of the plaintiff with Vigurs was dissolved on the 30th September, 1818, but no settlement of accounts ever took place; that a commission issued against Vigurs on the 1st March, 1819, and assignees (three of the defendants to the bill) were chosen; that Johnston and Meaburn never accounted for the proceeds of the earthenware, and that there is an open and unsettled account subsisting between them relative thereto; and that upon a fair statement of their receipts and payments in respect of such adventure, a considerable balance is due to the firm of Vigurs and Co. from the defendants, Johnston and Meaburn.

The bill, amongst other things, charged that one of the items on which the defendants, Johnston and Meaburn, claimed to be entitled to a balance in their favor, was a charge of 220*l.* 7*s.* 7*d.* for discount, at 35*l.* per cent. and three per cent. for breakage, upon the sum at which the goods were alleged to be sold, which claim was contrary to the custom of the trade. The prayer of the bill was for an account.

The defendants, Johnston and Meaburn, put in a general demurrer for want of equity.

Mr. Treslove, in support of the demurrer. This is not a case in which a bill will lie; the plaintiff's remedy is at law. He might file a bill for a discovery only, but not a bill for relief. Lord THURLOW says, in Hoare *v.* Contencin,[1] "As to an account, this is only a repayment of money, and that the money for which the teas sold shall be deducted." In that case the demurrer was allowed. In Dinwiddie *v.* Bailey, Lord ELDON says, "there must be mutual demands to support a bill for an account." In this case there is only one article to account for, viz., the cargo of earthenware; there was no other matter of account between the parties.

This is not like the case of an account sought against a factor or trustee. There was a case before the late vice-chancellor, where the plaintiff filed a bill against his banker for an account; I demurred to the bill, and the demurrer was allowed.[2]

THE VICE-CHANCELLOR. The defendants here were agents for the sale of the property of the plaintiff, and wherever such a relation exists, a bill will lie for an account. The plaintiff can only learn from the discovery of the defendants how they have acted in the execution of their agency; and it would be most unreasonable that he should pay

[1] 1 Bro. C. C. 27.

[2] The argument for the plaintiff is omitted. — ED.

them for that discovery, if it turned out that they had abused his confidence; yet such must be the case if a bill for relief will not lie.

Demurrer overruled.[1]

E. T. FOLEY, Appellant, *v.* T. HILL and Others.

In the House of Lords, August 1, 1848.

[2 *House of Lords Cases*, 28.]

The appellant by his bill prayed that an account might be taken of 6117*l.*, and all other sums received by the respondents as his bankers since April 1829, and also an account of all sums properly paid by them to or for him during the same period and a payment to him of the balance found to be due.[2]

The Lord Chancellor. [Cottenham.] The bill in this case — as is usual in cases of this description where bills state matters of account, and where there is concurrent jurisdiction at law and

1 A bill for an account was maintained against the defendant as a fiduciary in the following cases: Lavender *v.* Hilton (1385), 10 Seld. Soc. No. 1 (defendant, a clerk of the chancery received money from A to the use of the plaintiff); Uncle *v.* Fyldyng (1474-1484), 2 Cal. Ch. LXV. (factor — bill in equity filed, because no remedy at law, the merchandise having been received without the realm); Holtscomb *v.* Rivers, 1 Ch. Ca. 127 (factor); Salisbury *v.* Cecil, 1 Cox, Eq. 277 (steward); Massey *v.* Banner, 4 Madd. 413, 417 (agent); Hunter *v.* Belcher, 12 W. R. 121 (commercial traveller); Makepeace *v.* Rogers, 4 D. J. & S. 649 (steward); Colonial Co. *v.* Hutchinson Co., 44 Fed. R. 219 (agent to invest); Halsted *v.* Rabb, 8 Port. 63 (agent to sell); Garr *v.* Redman, 6 Cal. 574 (joint adventurer); Norton *v.* Hixon, 25 Ill. 439 (sheriff); Craig *v.* McKinney, 72 Ill. 305; Gates *v.* Fraser, 9 Ill. Ap. 624 (agent to sell); Coquillard *v.* Suydam, 8 Blackf. 24, 30 (agent); Bruce *v.* Burdet, 1 J. J. Marsh. 80 (factor); Webb *v.* Fuller, 77 Me. 568; Bartlett *v.* Parks, 1 Cush. 82 (agent to sell); Pratt *v.* Tuttle, 136 Mass. 233 (assignee of one half of patent to account for one half of profits); Clarke *v.* Pierce, 52 Mich. 157 (joint adventurer); Darrah *v.* Bryce, 62 Mich. 480 (factor); Petrie *v.* Torrent, 88 Mich. 43 (joint adventurer); Warren *v.* Holbrook, 95 Mich. 185 (agent to sell); Boyce *v.* Boyce, 124 Mich. 696 (factor); Garner *v.* Reis, 25 Minn. 475 (agent to sell); Brooks *v.* Goodwin, 70 N. H. 281 (agent to collect); Scudder *v.* Budd, 52 N. J. Eq. 320 (joint adventurer); Post *v.* Kimberly, 9 Johns. 470 (constructive trustee); Marvin *v.* Brooks, 94 N. Y. 71 (factor); Walker *v.* Spencer, 59 How. Pr. 71 (agent to sell); McLin *v.* McNamara, 2 Dev. & B. Eq. 82 (agent to sell); State *v.* Quinn, 74 N. Ca. 359 (guardian); U. S. Bank *v.* Biddle, 2 Pars. Eq. 31 (agent); Kerr *v.* Camden Co., Cheves, Eq. 189 (*semble*); Hale *v.* Hale, 4 Humph. 183 (agent to sell); Taylor *v.* Tompkins, 2 Heisk. 89 (agent to sell); Coffman *v.* Sangster, 21 Gratt. 263; Thornton *v.* Thornton, 31 Gratt. 212 (steward); Vilwig *v.* Baltimore Co., 79 Va. 449; Schwickerath *v.* Lohen, 48 Wis. 599; Rippe *v.* Stogdill, 61 Wis. 38 (agent to invest).

A bill for an account was not allowed against a fiduciary in the following cases: King *v.* Rossett, 2 Y. & J. 33 (stock broker — see criticism of this case by Professor Langdell in 2 Harv. L. Rev. 260, n. 4); Navulshaw *v.* Brownrigg, 2 D. M. & G. 441, 459 (*semble* — factor, a single transaction); Hemmings *v.* Pugh, 4 Giff. 456 (money received by B to use of A); Blakeley *v.* Biscoe, Hempst. 114 (agent to collect — because remedy at law adequate); Miller *v.* Kent, 16 Fed. R. 13 (commission merchant — probably a debtor); Halsted *v.* Rabb, 8 Port. 63, 65 (*semble* — agent, a single transaction); Crothers *v.* Lee, 29 Ala. 331, 341 (*semble* — agent, a single transaction); State *v.* Bradshaw, 60 Ala. 239 (public officer); Powers *v.* Cray, 7 Ga. 206 (attorney — because remedy at law adequate). — Ed.

2 The statement of facts is condensed, and the arguments, the concurring judgments of Lords Brougham, Campbell, and Lyndhurst, and portions of the judgment of the Lord Chancellor are omitted. — Ed.

equity — alleges that the account is complicated and consists of a great variety of items, so that it could not be properly taken at law. If that allegation had been made out, it would have prevented the necessity of considering any other part of the case. But that allegation has entirely failed of proof; for it appears that the account consisted of only one payment of 6117*l.* 10*s.* to a private account of the customer, and that against that sum two checks were drawn and paid. That is the whole account in dispute as raised by these pleadings. Therefore there is certainly no such account as would induce a court of equity to maintain jurisdiction as if the question had turned entirely upon an account so complicated, and so long, as to make it inconvenient to have it taken at law.

It has been attempted to support this bill upon other grounds, and one ground is that the relative situation of the plaintiff and defendant would give a court of equity jurisdiction, independently of the length or the complexity of the accounts; although it is not disputed that the transactions between the parties gave the legal right, it is said a court of equity nevertheless has concurrent jurisdiction and that is attempted to be supported upon the supposed fiduciary character existing between the banker and his customer.

No case has been produced in which that character has been given to the relation of banker and customer; but it has been attempted to be supported by reference to other cases supposed to be analogous. These are cases where bills have been filed as between principal and agent, or between principal and factor. Now as between principal and factor, there is no question whatever that that description of case which alone has been referred to in the argument in support of the jurisdiction has always been held to be within the jurisdiction of a court of equity, because the party partakes of the character of a trustee. Partaking of the character of a trustee, the factor — as the trustee for the particular matter in which he is employed as factor — sells the principal's goods, and accounts to him for the money. The goods, however, remain the goods of the owner or principal until the sale takes place, and the moment the money is received the money remains the property of the principal. So it is with regard to an agent dealing with any property; he obtains no interest himself in the subject-matter beyond his remuneration; he is dealing throughout for another, and though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction for which he is engaged; and therefore in these cases the courts of equity have assumed jurisdiction.

But the analogy entirely fails, as it appears to me, when you come to consider the relative situation of a banker and his customer; and for that purpose it is quite sufficient to refer to the authorities which have been quoted, and to the nature of the connection between the parties. Money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that de-

posited with him when he is asked for it. The money paid into the banker's is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money: he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy if he engages in a hazardous speculation; he is not bound to keep it or deal with it as the property of his principal; but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.

If that analogy fails, and we come to the mere contract, then the matter is not brought within the rules of a court of equity as in reference to other matters of contract. I am surprised to find that this very well-known analogy and established principle should be matter of doubt or discussion at this time. Although courts of equity will assume jurisdiction in matters of account, it is not because you are entitled to discovery that therefore you are entitled to an account. That is entirely a fallacy. That would, if carried to the extent to which it would be carried according to the argument at the bar, make it appear that every case is matter of equitable jurisdiction, and that where a plaintiff is entitled to a demand, he may come to a court of equity for discovery. But the rule is that where a case is so complicated, or where, from other circumstances, the remedy at law will not give adequate relief, there the court of equity assumes jurisdiction.

We find no complicated account at all here. There is merely a sum of money paid in on the one hand, for which there is a receipt, which receipt is the evidence of the party's title, and if there be any sum of money drawn out, it is no part of his title and no part of his case; but it is a part of his case to make that demand, and to show that part of that money had not been repaid.

The principle upon which my opinion is formed is that there is nothing to bring the demand within the precincts of a court of equity. Upon that ground I think the decree was right in dismissing the bill.

Appeal dismissed.

PHILLIPS *v.* PHILLIPS.

BEFORE SIR GEORGE JAMES TURNER, V. C., FEBRUARY 19, 1852.

[9 *Hare*, 471.]

THE bill was filed for an account of moneys received by the defendant and his deceased partner on their joint account, on account of the plaintiff; and of the moneys which the defendant and his deceased partner had paid on their joint account, on account of the plaintiff; and for payment of the balance.

The bill stated that for several years before August, 1847, the defendant and his brother (since deceased) carried on business as jewellers in Cockspur Street, and were in the habit, from time to time, of receiving divers sums of money from and on account of the plaintiff, and the sums so received were treated by them as part of their copartnership assets; and the defendant and his partner were also in the habit, from time to time, of advancing and paying out of their copartnership funds divers sums of money to, for, and on account of the plaintiff; and that there was, in fact, a current account between the plaintiff on the one part and the defendant and his partner on the other part; that the account was balanced in January, 1843, and a certain sum then stated and agreed to be due to the plaintiff thereupon, as appeared by the books of the firm in the possession of the defendant, which he refused to produce or show to the plaintiff; and that, between that time and August, 1847, the defendant and his partner had received upwards of 650*l.* on account of the plaintiff, the particulars of which would appear from the said books. The bill stated that the transactions between the plaintiff and the defendant and his partner were very numerous; and that amongst other moneys which they had received on account of the plaintiff were moneys arising from the sale of divers railway shares belonging to the plaintiff, sold by them on his account.

The bill charged that an account ought to be taken of the receipts and payments by the defendant and his partner on account of the plaintiff; and that a large sum of money was in fact due to the plaintiff on the balance of such account.

The defendant demurred for want of equity.[1]

THE VICE-CHANCELLOR. I have no doubt that this bill cannot be maintained. I take the rule to be that a bill of this nature will only lie where it relates to that which is the subject of a mutual account; and I understand a mutual account to mean not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account. I take the reason of that distinction to be, that in the case of proceedings at law, where each of two parties has received and paid

[1] The arguments of counsel are omitted. — ED.

on account of the other, what would be to be recovered would be the balance of the two accounts; and the party plaintiff would be required to prove, not merely that the other party had received money on his account, but also to enter into evidence of his own receipts and payments, a position of the case which, to say the least, would be difficult to deal with at law. Where one party has merely received and paid moneys on account of the other, it becomes a simple case. The party plaintiff has to prove that the moneys have been received, and the other party has to prove his payments. The question is only as to the receipts on one side and the payments on the other, and it is a mere question of set-off; but it is otherwise where each party has received and paid. Mr. *Baggallay* says, and says truly, that there are cases of the first description which may still come to a court of equity. It is true that a case of mere receipts and payments may become so complicated, as Lord COTTENHAM said in the case of the Taff Vale Railway Company, that the account cannot be taken at law, and may become properly the subject of the jurisdiction of a court of equity. But where the account is on one side only, I think a strong case must be shown before this court will exercise its jurisdiction.[1] If the door of this court be opened to entertain every case in which accounts would not be taken in an action at law, but a court of law would send them to a reference, I do not know where there would remain any protection against suits in equity to parties between whom any account existed.

It was argued that the plaintiff cannot know how to frame his action until he has seen the account, and until he knows how his case stands. The answer to that is that his remedy is not to file a bill for relief, but for discovery. The case of Mackenzie *v.* Johnston, which was cited, is the case of an agency account throughout; but the circumstance that a party may have been agent of the other in the receipt of a certain sum of money, or in one particular matter, does not necessarily render the case one in which a bill in equity may be brought for an account. I am of opinion that this is a case in which a court of law has jurisdiction, and that there is no ground for the interference of this court which does not apply to every case in which one party has received money on account of another.

Demurrer allowed.

1 "In the case of Smith *v.* Leveaux, 1 H. & M. 123, Vice-Chancellor WOOD, in noticing the cases of Dinwiddie *v.* Bailey and Phillips *v.* Phillips, appears to have treated them as authorities to show that this court will not interfere where the receipts and payments are all on one side. But I doubt whether that be the law of this court. There are many cases between principal and agent where the receipts and payments are wholly on one side, in which, however, this court has exercised its jurisdiction. . . . That jurisdiction still remains, and wherever an agency partakes of a fiduciary character this court has jurisdiction, and will direct an account, although the receipts and payments are all on one side, and there are no mutual payments between the parties. That rule has not been shaken by the decision in Phillips *v.* Phillips, though there are passages in the judgment in that case which may seem at first to be inconsistent with the principle to which I have adverted." Per STUART, V. C., in Heming *v.* Pugh, 4 Giff. 456, 458.

In Makepeace *v.* Rogers, 4 De J. & S. 649, 654, TURNER, L. J., referring to Phillips *v.*

BARRY *v.* STEVENS.

BEFORE SIR JOHN ROMILLY, M. R., JUNE 25, 1862.

[31 *Beavan*, 258.]

THE plaintiff and defendants accordingly entered into a written agreement, dated in August, 1860, in the following terms: —

"It is hereby agreed that V. & R. Stevens shall publish the said work, and shall account to W. W. Barry, annually (namely, to the 31st day of December in each year), for all copies sold at the wholesale booksellers' price, excepting the copies subscribed for by the trade, which are to be accounted for at 5*l.* per cent. less than the wholesale booksellers' price, and twenty-five copies at twenty-four, where so subscribed for, and shall deduct a commission of 10*l.* per centum for their trouble in managing the same, advertising on the wrappers of their reports and in their sheet lists of publications, and for any losses they may sustain in giving credit upon the same, and that the balance of the said account shall be paid over to W. W. Barry on the 1st day of April in each year. The advertising the work to be done by and at the expense of the said W. W. Barry."

The defendants printed and published the work, and they, in March, 1862, rendered to the plaintiff an account down to the 31st of December, 1861, debiting him with 149*l.* 10*s.* 9*d.* and crediting him with 24*l.* 7*s.* To recover the balance of this account 125*l.* 3*s.* 9*d.*, the defendants brought an action at law and obtained an order under the 17 and 18 Vict. c. 125, referring the action to a master in the court of exchequer. To restrain this action and obtain an account the plaintiff filed his bill.[1]

THE MASTER OF THE ROLLS. After a careful perusal of this bill, I am of opinion that it cannot be supported. It is in fact, as it stands, nothing more than a mere money demand. It asks for an account of the performance of a contract for the printing, publishing, and selling five hundred copies of a work written by the plaintiff upon certain terms and conditions. The defendants render an account of what they have sold and of their expenses, and they bring an action for the balance. It is very much to be regretted undoubtedly (as I assume to be the case from what appears to have taken place before Mr. Baron BRAMWELL in chambers) that the rules of common law for the discovery and production of documents should be so much more limited

Phillips, said: "That case had no reference to a case of general account between principal and agent; and if his Lordship's language in giving judgment in that case had been in fact such as to give rise to misapprehension, such misapprehension ought to have been dispelled by what he said in the subsequent case of Padwick *v.* Stanley, when adverting to the want of correlation between the rights of a principal and an agent to sue in this court." — ED.

1 The statement of the case has been much condensed, and the arguments of counsel are omitted. — ED.

than in this court, and should therefore have led to the institution of this suit. But this suit is not confined to mere discovery, for it prays for relief. I am very far from laying down the proposition that an author would not be entitled to come for an account of his work sold by a printer and publisher who withheld that account entirely; but when there is a contract for the sale and publication of five hundred copies of a book, and the account has been rendered for it, and an action has been brought for the balance, and a bill is filed alleging no fraud or misstatement in that account, but merely seeking for the account, then I am of opinion that upon all the authorities it is not a case in which the principle (which I should be very sorry to disturb), that a principal is entitled to institute a suit in this court against his agent for an account of his dealings and transactions with him in his character of agent, would apply.

I am of opinion that this principle does not apply where the matter is comprised within certain specified limits, and the account as it stands is a mere money account, for which an action can be brought and which can be perfectly well tried in a court of law.

In fact it appears to me the account could be taken in exactly the same way before the master of the exchequer as it would be before me in chambers or before my chief clerk.

I must therefore allow the demurrer.

MOXON *v.* BRIGHT.

Before Lord Hatherley, C., January 29, 1869.

[*Law Reports*, 4 *Chancery Appeals*, 292.]

The plaintiffs in this case were owners of a patent for carpet looms, and in 1862 entered into an agreement with the defendant Hall, of the firm of Tuer & Hall, that if Messrs. Tuer & Hall would make and exhibit a loom the plaintiffs would allow them one tenth of the royalty which the plaintiffs might receive on looms sent on the continent; and further, that Messrs. Tuer & Hall might make and sell looms on which the royalty should be not more than £20, and Messrs. Tuer & Hall's charges should be not more than £45, making the total charge for the loom £65. By a subsequent agreement, the plaintiffs allowed Messrs. Tuer & Hall the sole right of making the looms at a royalty of £30 per loom. The agreement seemed also to have been varied verbally, and there was some conflict of evidence on the subject; but Messrs. Tuer & Hall had made and sold looms, and had paid considerable sums of money to the plaintiffs. In some cases they appeared to have obtained, with the consent of the plaintiffs, more than £65 for a loom, and to have accounted to the plaintiffs for the surplus, and in one case they seemed to have acted as agents for the plaintiffs, and to have col-

lected a sum due to the plaintiffs from one Stodhart for royalty on the number of yards of carpet manufactured.

In September, 1865, the plaintiffs filed the bill in this suit against the defendant Hall, the surviving partner of Messrs. Tuer & Hall, praying for an account and payment by him of all sums received by him to the use of the plaintiffs, and of all sums due to the plaintiffs in respect of the sales and licenses, and other property of the plaintiffs in connection therewith.

The Vice-Chancellor GIFFARD having dismissed the bill, the plaintiffs appealed.

LORD HATHERLEY, L. C., said that there were numerous cases showing that where the relation of principal and agent had imposed a trust upon the agent, the court would entertain a bill for an account, and the only difficulty was in determining what constituted this species of trust. It was not every agent who held a fiduciary position as between himself and his principal. Foley *v.* Hill showed that though a banker was the agent of the customer for many purposes, they were not such as would constitute a trust. Nor did the mere circumstance that the principal wanted discovery empower the court to give him assistance in the way of relief. The case of Smith *v.* Leveaux [1] showed that though you might be entitled to discovery, which you could get either in equity or at law, that did not entitle you to relief, for all depended upon the character of the agency. As between master and servant such an agency did not exist, and the Vice-Chancellor KNIGHT BRUCE, in Smith *v.* Leveaux, expressed his opinion that a court of equity ought not to entertain a suit in such a case.

His lordship then commented on the evidence, and said that the agreement between the plaintiffs and Messrs. Tuer & Hall had varied at different times, but the principal agreement was not that Tuer & Hall should act as agents for the plaintiffs, and collect £20 upon each loom for the plaintiffs, but that Tuer & Hall should take the debt upon themselves, selling the looms for £65, and paying £20 out of it to the plaintiffs, receiving besides the commission of 10 per cent. It was true that Messrs. Tuer & Hall were bound to consult the plaintiffs as to the sums charged for the looms, and that Mr. Hall, in one of his affidavits, did say that he acted as agent for the plaintiffs, but his lordship did not rely much on that, for every one who did anything for another was an agent, but was not therefore necessarily accountable in equity, as a banker, for instance. Even where Tuer & Hall obtained more than £20 as royalty, though they were accountable to the plaintiffs for what they had so received, it did not appear that they told the purchasers that they were to pay a royalty to the plaintiffs, but said merely that the charge for the machines would be a certain sum, so much for the machine itself, and so much for the royalty.

Though the terms between the parties were altered from time to time, the sole point in this suit was whether there existed between them an agency in which a fiduciary position was created, and looking

[1] 2 D. J. & S. 1.

at the whole case, though Tuer & Hall might never get more than £45 for a machine, and had to pay over all they received above that sum, this was too slender a foundation for a suit to compel an account. In fact, this would not be a matter of agency, but of special agreement in each case, and the case could not be brought within the principle upon which the court had directed accounts. In Navulshaw *v.* Brownrigg,[1] Lord St. Leonards said that a single case of agency would not be sufficient, as the matter might be determined at law, and this showed the principle on which the court acts in these cases. From Stodhart alone they seemed to have collected money due to the plaintiffs, and to have paid it over to them, but that was not sufficient to justify the court in directing an account. The appeal must be dismissed with costs.

THE TAFF VALE RAILWAY CO. *v.* W. NIXON AND OTHERS.

IN THE HOUSE OF LORDS, MAY 6, 1847.

[1 *House of Lords Cases*, 111.]

THE LORD CHANCELLOR[2] [COTTENHAM]. There were some cases cited in order to show that there are instances in which a court of equity refuses to exercise any jurisdiction upon any matter of law. I have no doubt that is so; but the question is whether this is one of those cases.

Now I think the rule is very well laid down by Lord Redesdale in the case of O'Connor *v.* Spaight,[3] in which he says: "The ground on which I think that this is a proper case for equity is, that the account has become so complicated that a court of law would be incompetent to examine it, upon a trial at *Nisi Prius*, with all necessary accuracy, and it could appear only from the result of the account that the rent was not due. This is a principle on which courts of equity constantly act, by taking cognizance of matters, which, though cognizable at law, are yet so involved with a complex account that it cannot properly be taken at law, and until the result of the account the justice of the case cannot appear. Matter of account may indeed be made the subject of an action; but an account of this sort is not a proper subject for this mode of proceeding. The old mode of proceeding upon the writ of account shows it. The only judgment was that the party 'should account,' and then the account was taken by the auditor. The court never went into it."

That, my Lords, is the rule applicable to questions of this sort; and it is quite obvious from the rule so laid down that each case must

[1] 2 D. M. & G. 441, 459.

[2] Only the judgment of the Lord Chancellor is given. Lord Campbell and Lord Brougham delivered concurring judgments. — ED.

[3] 1 Schoales & Lefroy, at p. 309.

be decided according to the peculiar circumstances belonging to it. It is, therefore, nothing to the purpose to show that there are cases where the court will not entertain jurisdiction, because it is a matter of law. Each case must be investigated, in order to see whether it comes within the rule laid down as that upon which a court of equity exercises its jurisdiction.

A very short reference to the facts of this case will show, beyond all controversy, that this is one of those cases. Here a contract was originally made by William Nixon with the railway company. A specification of the works to be done was appended to the contract. That certainly is complicated enough, as indeed all specifications of contracts are. It appears that he wanted money to carry into effect the contract which he had entered into, and he then applied to the other party, Storm, to assist him with money, and he assigned to him, as security for repayment of the money so advanced, the payments which he might have to receive under his contract.

This went on for some time, and afterwards a new scheme was adopted for the purpose of giving to the party who so advanced the money the security of the payments which might become due from the company in respect of the original contract with Nixon. To this contract all three were parties. It was made in the shape of a joint contract, by which both the liabilities and the rights arising out of the former contract were given up. The company on the one hand gave up their claim against the parties, and the parties gave up their claim against the company. The whole resulted in a new contract between the company on the one hand and these two parties on the other, by which they became joint contractors for the works which were to be performed under the contract originally entered into by Nixon with the railway company.

Now although that is in the form of a joint contract, and therefore gives to each party a right, independently of the other, to deal with the railway company, yet it is admitted, on all hands, that it was adopted for the purpose of adding to the security which Nixon was to give for the money to become due under the contract. But it appears that the other party was not only himself a party to the joint contract with Nixon, but that he himself executed work independently of Nixon. By this means there was an account between him and Nixon and the company, on account of the contract in which Nixon was a joint contractor; and there was also an account of payments that became due in respect of the contract which he had formerly entered into. The company, however, as they admit in their answer, dealt with these as payments on account generally, and they say that they are unable to say whether those payments are to be referred to the one account or to the other; the payments were made by them as the moneys became due, without reference to the particular works in respect of which they were made.

Then, not only is the account of this complicated nature between Nixon and the company, but as between the three there is the duty

of ascertaining to what contract and to what works the payments made are to be referred; a question of account utterly impossible to be investigated at *Nisi Prius*, not only from the complicated nature of the original account of receipts and payments, but from the mode in which the appellants, the company themselves, have dealt with the several contracts, not keeping distinct those payments in which Nixon was interested, but making them as payments on account generally, some of which might be referred to one account and some to another, but which they have not distinguished.

Under these circumstances Nixon files his bill, and asks for an account to be taken of what is due from this company in respect of the contract in which he was originally interested; and also for an account to be taken as between himself and the other party who had become interested in the account as security for the money advanced.

Looking at the rule laid down by Lord Redesdale, and looking at the facts of this case as they are developed in these papers, it appears to me clear that if ever there was a case which was quite unfit for a trial at law, and which necessarily became the subject of investigation in a court of equity, the facts of this case come within that rule; and that is the point for our consideration here. The appellants say: "You have no right to direct this account to be taken in equity; it is entirely a matter of law"; let us go to law to try the question between us." I think that the Vice-Chancellor was entirely right in the course that he took, and that the case ought to be investigated at equity.

I have therefore to move your Lordships that the decree appealed from be affirmed.

The decree was then affirmed with costs.[1]

[1] Because of the complication of the accounts, a bill in the nature of an equitable *assumpsit* was maintained in the following cases: Carlisle *v.* Wilson, 13 Ves. 276 (for tolls on all goods carried through the town); Bowles *v.* Orr, 1 Y. & C. Ex. 464 (customer *vs.* banker); Darthez *v.* Clemens, 6 Beav. 165 (factor *vs.* consignor); Kennington *v.* Houghton, 2 Y. & C. C. C. 620 (tenant *vs.* landlord); S. E. Co. *v.* Brogden, 3 Mac. & G. 8 (building contract); N. E. Co. *v.* Martin, 2 Ph. 758 (*semble* — building contract — laches); McIntosh *v.* Great Western Co., 3 Sm. & G. 146, 2 De G. & Sm. 758 (building contract); Croskey *v.* European Co., 1 J. & H. 108 (agent *vs.* principal, pending action restrained); Shepard *v.* Brown, 4 Giff. 208 (agent *vs.* principal); Hill *v.* South Co., 12 L. T. Rep. 63 (building contract); Dabbs *v.* Nugent, 11 Jur. N. S. 943 (building contract — pending action restrained); Waterford Co. *v.* London Co., 8 Eq. 241 (*semble* — agreement between two R. R. Co.'s); Southampton Co. *v.* Southampton Board, 11 Eq. 254 (Dock Co. *vs.* Harbor Commissioners — pending action restrained); Kimberley *v.* Dick, 13 Eq. 1 (building contract); Mitchell *v.* Great Works Co., 2 Story, 648 (agent *vs.* principal); Fenno *v.* Primrose, 116 Fed. R. 49 (factor *vs.* principal); Jackson *v.* King, 82 Ala. 432 (landlord *vs.* tenant); State *v.* Churchill, 48 Ark. 426 (State *vs.* treasurer); Farmer's Bank *v.* Polk, 1 Del. Ch. 167 (bank *vs.* cashier); Hill *v.* Daily, 161 Ill. 379 (employer *vs.* employee); Power *v.* Reeder, 9 Dana, 6 (numerous mutual transactions); Dillon *v.* Conn. Co., 44 Md. 386 (principal *vs.* agent); Ferry *v.* Henry, 4 Pick. 74 (employee *vs.* employer); Pierce *v.* Equitable Co., 145 Mass. 56 (holder of tontine policy *vs.* Ins. Co.); Seymour *v.* Long Dock Co., 20 N. J. Eq. 396 (building contract); American Co. *v.* Landau, 62 N. J. Eq. 73 (adjustment of complicated insurance liabilities); Ludlow *v.* Simond, 2 Cai. Cas. 1 (factor *vs.* principal); Wilson *v.* Mallett, 4 Sandf. 112 (factor *vs.* principal — stress laid upon mutuality of the accounts); Kerr *v.* Camden Co., Cheves, Eq. 189 (agent *vs.* principal — stress laid upon reciprocal right of agent against principal); Stothart *v.* Burnet, Cooke, 417 (building contract); Hay *v.* Marshall, 3 Humph. 623 (clerk of court *v.* marshall); Governor *v.* McEwen, 5 Humph. 241 (state *vs.* treasurer); Hickman *v.* Stout, 2 Leigh, 6; O'Connor *v.* Spaight, 1 Sch. & Lef. 305 (tenant *vs.* landlord).

HARRINGTON *v.* CHURCHWARD AND OTHERS.

BEFORE WOOD, V. C., MARCH 2, 1860.

[29 *Law Journal Reports, Chancery*, 521.]

THE defendants, government mail contractors, entered into a contract with the plaintiff, by which the latter was to act as the superintendent of the engineering department of all steamships or vessels which should be used in the mail service specified, and was to receive as remuneration the yearly sum of 450*l.*, and, in addition thereto, a sum equivalent to 10*l.* per cent. on the net profits, if any, to be derived from the vessels engaged in the said mail and packet service. The bill was filed praying for an accounting and payment of 10*l.* per cent. of the profits.[1]

WOOD, V. C. Upon the question, as to the plaintiff's right to sue in equity, it was contended strongly by Sir Hugh Cairns, on behalf of the defendants, that if this was a contract of hiring and service, then the plaintiff had no right to maintain a suit in equity, that he had his action, and the most he could have was a discovery of the profits in order to get his proportion of 10*l.* per cent. Now, if there had been a declaration made year after year, as provided by the contract, as to the profits and earnings of the business, the case might have been different, but from the mode in which the parties have dealt it is plain to me that this gentleman has a right to come to this court for an account of the profits, not in the shape of discovery, but under

In the following cases, the transactions not being sufficiently complicated, equitable relief was denied. Parry *v.* Owen, 3 Atk. 740, Amb. 109 s. c. (attorney *vs.* client); Moses *v.* Lewis, 12 Price, 502 (tenant *vs.* landlord); Frietas *v.* Dos Santos, 1 Y. & J. 574 (agent *vs.* principal); Allison *v.* Herring, 9 Sim. 533 (attorney *vs.* client); Padwick *v.* Hunt, 18 Beav. 575 (attorney *vs.* client); Fluker *v.* Taylor, 3 Drew, 183 (solicitor *vs.* clerk); Flockton *v.* Peake, 12 W. R. 462, 10 L. T. Rep. 173 (building contract); Bliss *v.* Smith, 34 Beav. 508 (building contract); Fowle *v.* Lawrason, 5 Pet. 494 (landlord *vs.* tenant); Guarantee Co. *v.* Mechanics Co., 80 Fed. R. 776 (*semble* — objection to jurisdiction waived); Randolph *v.* Tandy, 98 Fed. R. 939, 941 (*semble*); Dickinson *v.* Garthwaite, 34 Ala. 638 (seller *vs.* buyer); Avery *v.* Ware, 58 Ala. 475; Beggs *v.* Edison Co., 96 Ala. 295 (Co. *vs.* treasurer); Clinton Co. *v.* Schuster, 82 Ill. 137 (county *vs.* treasurer); Henderson *v.* Flanagan, 75 Ill. Ap. 283; Badger *v.* McNamara, 123 Mass. 117 (agent *vs.* principal); Nesbit *v.* St. Patrick's Church, 9 N. J. Eq. 76 (building contract); Ely *v.* Crane, 37 N. J. Eq. 157 (mutual demands); Lynch *v.* Willard, 6 Johns. Ch. 342 (attorney *vs.* client); Salter *v.* Ham, 31 N. Y. 321 (creditor *vs.* debtor); Uhlman *v.* N. Y. Co., 109 N. Y. 421 (holder of tontine policy *vs.* Ins. Co.); Durant *v.* Einstein, 5 Robt. 423 (pledgor *vs.* pledgee); Long *v.* Cochran, 9 Phila. 267 (seller *vs.* buyer); Smith *v.* Marks, 2 Rand. 449 (building contract); Lefever *v.* Billmyer, 5 W. Va. 53 (sheriff *vs.* deputy); Van Dorn *v.* Lewis Co., 38 W. Va. 267 (seller *vs.* buyer).

A simple averment that the transactions are too complicated to be dealt with by a jury is not sufficient. The bill must set out the nature of the transactions so fully as to disclose the complication. Frietas *v.* Dos Santos, 1 Y. & J. 574; Padwick *v.* Hunt, 18 Beav. 575; Randolph *v.* Tandy, 98 Fed. R. 939; Beggs *v.* Edison Co., 96 Ala. 295; Badger *v.* McNamara, 123 Mass. 117; Ely *v.* Crane, 37 N. J. Eq. 157; Lefever *v.* Billmyer, 5 W. Va. 53; Van Dorn *v.* Lewis Co., 38 W. Va. 267; O'Mahony *v.* Dickson, 2 Sch. & Lef. 400 (tenant *vs.* landlord). — ED.

[1] This short summary of the facts is substituted for the statement in the report. Only so much of the judgment is given as relates to the question of equity jurisdiction. — ED.

the clause contained in the agreement, providing that proper accounts should be made out annually, which has never been done. That never having been done, the plaintiff has a right, not merely to discovery, but to have that account taken which the parties have not chosen to take for themselves, and that alone would be enough to bring him into this court. But if it depended on the more narrow point, on his wages depending upon the profits, and his wanting the discovery in respect of that, there being, as they contend, no specific agreement, the case would fall distinctly within the authority of the Taff Vale Railway Co. *v.* Nixon, where the whole contest was as to whether it was not a contract at law, and whether the party was not wrong in coming into equity. It is enough for me to cite this passage from Lord Cottenham's judgment. He says: "That is the rule applicable to questions of this sort. It is obvious from the rule so laid down that each case must be decided according to the peculiar circumstances belonging to it. It is therefore nothing to the purpose to show that there is anything which does not come within the contemplated account." [1] The present Lord Chancellor,[2] in agreeing with the judgment in that case, says he is satisfied that such an account never would be taken by a jury. The parties must be driven to an arbitration, and for that reason he comes to the conclusion that the account must be taken in equity. Upon Churchward's own statement it appears the accounts were so complicated that he found it impossible himself to make out a balance sheet. If any case was ever made out for the aid of a court of equity, it is this one. A jury would be manifestly incompetent to do that which, according to the evidence, two skilful accountants were three weeks employed upon, and the defendant and his two clerks for several months. I think, therefore, that the plaintiff had a right to come to this court for an account.[3]

[1] 1 H. L. C. 122.

[2] Lord Campbell.

[3] Katsch *v.* Schenck, 13 Jur. 668 (*semble*); Harvey *v.* Sellers, 115 Fed. R. 757; Channon *v.* Stewart, 103 Ill. 541; Buel *v.* Selz, 5 Ill. Ap. 116; Reddington *v.* Lanahan, 59 Md. 429; Ferry *v.* Henry, 4 Pick. 75; Mass. Hospital *v.* State Co., 4 Gray, 227 (*semble*); Hallett *v.* Cumston, 110 Mass. 32; Badger *v.* McNamara, 123 Mass. 117, 120; Stockman *v.* Michell, 109 Mich. 348, 350 (*semble*); Eastman *v.* Clark, 53 N. H. 276, 325 (*semble*); Hargrave *v.* Conroy, 19 N. J. Eq. 281, 284; Alpaugh *v.* Wood, 45 N. J. Eq. 153; Lilliendahl *v.* Stegmair, 45 N. J. Eq. 648; Rusling *v.* Brodhead, 55 N. J. Eq. 200, 202; Marston *v.* Gould, 69 N. Y. 220; Parker *v.* Pullman, 36 N. Y. Ap. Div. 208; Lee *v.* Washburn, 37 N. Y. Ap. Div. 311 (see, however, Smith *v.* Bodine, 74 N. Y. 30); Bentley *v.* Harris, 10 R. I. 434 *Accord*. — Ed.

F. J. HAYWOOD *v.* J. F. HUTCHINS, Executor.

Supreme Court, North Carolina, June Term, 1871.

[65 *North Carolina Reports*, 574.]

Dick, J.[1] The jurisdiction of courts of equity in matters of account is assumed where the courts of law cannot conveniently ascertain and adequately administer the rights of the parties. It is ordinarily exercised where the defendant occupies such a position or relation as requires him to keep and render an account to the plaintiff; and also where there are mutual dealings between the parties, not constituting mere matters of set-off, but requiring, in order to ascertain the balance, a more complicated account, than can practically be taken at law. Adams's Equity, 222.

In our case, the plaintiff as a physician rendered professional services to the testator of the defendant, for a long series of years, and received at various times partial payments which were duly credited; and there was no difficulty in striking a proper balance.

The defendant's testator was a farmer, and at various times furnished agricultural products to the plaintiff at the market prices. There was no agreement between the parties that their cross-demands should constitute items of account, and the claims of the one should be in satisfaction *pro tanto* of the other. These transactions had no business connection with each other, but were entirely independent, and constituted mere matters of set-off which could be easily ascertained and adjusted in a court of law.

In McLin *v.* McNamara,[2] the transaction between the parties consisted of a continuous course of dealing in the way of trade and merchandise, and created mutual and dependent demands.

There was no necessity for the plaintiff in this case to resort to the extraordinary jurisdiction of a court of equity, as his remedy at law was plain and adequate.

The bill must be dismissed.

[1] Only the opinion of the court is given. — Ed.
[2] 2 Dev. & Bat. Eq. 82.

CHAPTER IV.

SPECIFIC REPARATION AND PREVENTION OF TORTS.

SECTION I.

Waste.

WHITFIELD *v.* BEWIT.

Before Lord Macclesfield, C., January 24, 1724.

[2 *Peere Williams*, 240.]

One seised in fee of lands in which there were mines all of them unopened, by deed conveyed those lands and all mines, waters, trees, &c., to trustees and their heirs, to the use of the grantor for life (who soon after died), remainder to the use of A for life, remainder to his first, &c., son in tail male successively, remainder to B for life, remainder to his first, &c., son in tail male successively, remainder to his two sisters C and D and the heirs of their bodies, remainder to the grantor in fee.

A and B had no sons, and C, one of the sisters, died without issue, by which the heir of the grantor, as to one moiety of the premises, had the first estate of inheritance.

A, having cut down timber, sold it and threatened to open the mines; the heir of the grantor, being seised of one moiety *ut supra* by the death of one of the sisters without issue, brought this bill for an account of the moiety of the timber and to stay A's opening of any mine.[1]

It was urged, that the mines being expressly granted by this settlement with the lands, it was as strong a case as if the mines themselves were limited to A for life, and like Saunders's Case in 5 Co. 12, where it is resolved, that on a lease made of land together with the mines, if there be no mines open, the lessee may open them; so in this case, there being no mines open, the *cestui que use* for life might open them.

But Lord Chancellor *contra:* A having only an estate for life subject to waste, he shall no more open a mine than he shall cut down the timber-trees, for both are equally granted by this deed; and the meaning of inserting mines, trees, and water was that all should

1 The court decided that the timber cut belonged to the person who was seised of the first estate of inheritance at the time of severance. So much of the report as relates to this point is omitted. — Ed.

pass, but as the timber and mines were part of the inheritance, no one should have power over them but such as had an estate of inheritance limited to him.

Of which opinion was Lord Chancellor King on a rehearing.[1]

[1] Injunctions were issued to restrain legal waste in the following cases: Horner *v.* Popham, 1701, Colles, P. C. 1, 8 (cutting timber — earliest reported case); Leighton *v.* Leighton, 1747, 1 Bro. C. C. 168 n. (cutting timber); Bathurst *v.* Burden, 2 Bro. C. C. 64 (damaging fish-ponds); DeWilton *v.* Saxon, 6 Ves. 106 (*semble* — ploughing ancient meadow); Drury *v.* Molins, 6 Ves. 328 (ploughing pasture land); Onslow *v.* ———, 16 Ves. 173 (removal of manure); Pratt *v.* Brett, 2 Madd. 62 (cutting timber, ploughing ancient meadow, sowing mustard seed); Hussey *v.* Hussey, 5 Madd. 44 (cutting timber); Smythe *v.* Carter, 18 Beav. 78 (demolition of house); West Ham Board *v.* East London Co., 1900, 1 Ch. 624 (covering land with rubbish to depth of ten feet); Jungerman *v.* Bovee, 19 Cal. 354 (removal of building); Wilds *v.* Layton, 1 Del. Ch. 226 (improper tillage); Dickinson *v.* Jones, 36 Ga. 97 (cutting timber); Smith *v.* Smith, 105 Ga. 106 (cutting timber); Dawson *v.* Coffman, 28 Ind. 220 (cutting timber); Modlin *v.* Kennedy, 53 Ind. 267 (cutting timber); Miller *v.* Shields, 55 Ind. 71 (cutting timber); Robertson *v.* Meadows, 73 Ind. 43 (cutting timber); Wilson *v.* Galley, 101 Ind. 257, 260 (*semble* — cutting timber); Gwaltney *v.* Gwaltney, 119 Ind. 144 (*semble* — cutting timber); Georges Co. *v.* Detmold, 1 Md. Ch. 371 (cutting timber); Maddox *v.* White, 4 Md. 72 (changing character of a building); Baugher *v.* Crane, 27 Md. 36 (changing character of storehouse); Chapel *v.* Hull, 60 Mich. 167 (ploughing all the meadow land); Dawson *v.* Tremaine, 93 Mich. 320 (*semble* — cutting timber); Cannon *v.* Barney, 59 Miss. 289 (dismantling a gin-house); Hughes *v.* Burriss, 85 Mo. 660 (mining); Miles *v.* Miles, 32 N. H. 147 (*semble* — cutting timber); Ware *v.* Ware, 6 N. J. Eq. 117 (cutting timber); Fortescue *v.* Bowler, 55 N. J. Eq. 741 (removal of building); Douglass *v.* Wiggin, 1 Johns. Ch. 435 (altering dwelling-house into a store); Kane *v.* Vanderburgh, 1 Johns. Ch. 455 (cutting valuable timber); Sarles *v.* Sarles, 3 Sandf. Ch. 601 (cutting timber); Kidd *v.* Dennison, 6 Barb. 9 (cutting timber); Lee *v.* Whallon, 20 N. Y. W. D. 366 (plaintiff a contingent remainderman); Davis *v.* Gilliam, 5 Ired. Eq. 308 (cutting valuable timber to sell); Davenport *v.* Magoon, 13 Oreg. 3 (demolition of building); Denny *v* Brownson, 29 Pa. 382 (cutting timber); Smith's Ap., 69 Pa. 474 (cutting timber); Clagon *v.* Veasey, 7 Ired. Eq. 173 (*semble* — removal of slave to parts unknown); Lehman *v.* Logan, 7 Ired. Eq. 296 (same as preceding case); Dupre *v.* Williams, 5 Jones, Eq. 96, 98 (same as preceding case); Smith *v.* Poyas, 2 Dess. 65 (cutting timber); Dooley *v.* Stringham, 4 Utah, 107 (demolition of building); University *v.* Tucker, 31 W. Va. 621 (selling clay); Williamson *v.* Jones, 39 W. Va. 231 (removal of petroleum); Poertner *v.* Russell, 33 Wis. 193 (removal of mill-machinery); Brock *v.* Dole, 66 Wis. 142 (alteration of building by erecting chimney).

In the following cases of alleged legal waste the plaintiff failed to obtain an injunction. Clavering *v.* Clavering, 2 P. Wms. 388 (making new mine openings to work old vein); Anon. Amb. 209 (working coal pits irregularly); Jones *v.* Chappell, 20 Eq. 539 (erection of a new house); Meux *v.* Cobley, 1892, 2 Ch. 253 (conversion of part of farm into market garden); Dunn *v.* Ryan, 7 Ir. R. Eq. 143 (cutting hedges); Calvert *v.* Rice, 91 Ky. 533 (cutting timber for repair of premises); Crowe *v.* Wilson, 65 Md. 479 (demolition of houses by lessee with a covenant for perpetual renewal — unless security for payment of rent endangered); Gaines *v.* Green Co., 33 N. J. Eq. 603 (working mines already opened); Winship *v.* Pitts, 3 Paige, 259 (erection of new house); Neel *v.* Neel, 19 Pa. 323 (working mines already opened); Irwin *v.* Covode, 24 Pa. 162 (working mines already opened).

A patron is entitled to an injunction to restrain legal waste by a rector or vicar. Brady *v.* Stratchy, Barnard. Ch. 399; Knight *v.* Mosely, Amb. 166 (digging stones); St. Albans *v.* Skipwith, 8 Beav. 354 (*semble* — but not for ploughing meadow, if for benefit of land); Marlborough *v.* St. John, 5 DeG. & Sm. 174 (cutting timber); Holden *v.* Weeks, 1 J. & H. 278 (working gypsum mines); Sowerby *v.* Fryer, 8 Eq. 417 (cutting timber). — Ed.

DOHERTY *v.* ALLMAN.

House of Lords, April 2, 1878.

[*Law Reports*, 3 *Appeal Cases*, 709.]

The Lord Chancellor (Lord Cairns).[1] The question in this case arises upon two leases which are now vested in the respondent. One of them is dated in the year 1798, and is for the long term of 999 years; the other was granted in 1824, and is for the term of 988 years; the first being at the rent of £10, and the second at a rent of £32 19*s*. The reversion to both these leases is vested in the present appellant.

The property demised is thus described: [His lordship read the description of the premises contained in each lease, and also the words of the covenant in each.

There is not in either of these leases any power of entry for breach of covenant, but there is a power that if rent was not duly paid and no sufficient distress found on the premises to satisfy the arrears, it should be lawful to the lessor to reënter and repossess himself of his former estate.

That is the substance of the two leases. The property demised, so far as it consisted of buildings, was in the form of stores — and, as we understand, stores for storing corn. It is stated in evidence, and does not appear to be a matter of controversy between the parties, that since the date of these leases a considerable change has occurred with reference to the demand for buildings of this description in the neighborhood of Bandon; and it is stated, and does not appear to be seriously controverted, that in the town of Bandon, which seems to lie at a lower level than where these stores are built, there is now a considerable — perhaps an exuberant — supply of store buildings, access to which, or facility of carriage, is greater than to this higher ground, and that, therefore, there is serious difficulty in obtaining a tenant for this property used as stores. Under these circumstances the respondent has had specifications prepared, which appear to be prepared in a careful, proper, and business-like way, and he has had a contract made in accordance with those specifications, by which the external walls of this building are to be retained, and those external walls, where one part of the building is of a lower height than the rest, are to be raised, so that the building may be of a uniform height; internal changes are to be made, internal party walls are to be introduced, the flooring is to be altered in its level, and six dwelling-houses are to be made out of this which now is one long store. Your lordships have before you a photograph of the building as it now appears, and an elevation of the building as it is proposed to

[1] Only so much of the judgments of Lord Cairns and Lord O'Hagan is given as relates to the question of waste. The judges were unanimous in thinking that an injunction should not issue as a means of compelling specific performance of the contract. See, to the same effect, *In re* McIntosh Co., 61 L. J. Q. B. 164. — Ed.

be has also been put in evidence; and certainly it does appear a strange thing to any spectator that it should ever come to be a matter of grave dispute between two rational men as to whether that which was proposed to be done is not almost as great an improvement as could be effected. However, so it is, and with that state of things your lordships have to deal.

The appellant objects to this being done. The owner of the reversion subject to this long term of years objects to that which the holder of the lease proposes to do.

There is no doubt that the Court of Chancery exercises a jurisdiction in restraining waste, and where waste is committed in requiring an account of the waste for the purpose of recompensing the person who has suffered; but I apprehend it is perfectly clear that the Court of Chancery, acting in that case in advance of the common law right, will, in the first place, consider whether there is, or is not, any substantial damage which would accrue, and which is sought to be prevented, and will make that inquiry. In the present case it appears to me to be extremely doubtful whether any jury could be found, who, after this work shall be executed in the way that is proposed, would say that any damage had been done by the work to the inheritance. And I doubt, farther, whether it must not be taken as clear from the evidence here that any jury, or any tribunal judging upon the question of fact, would not say that, if there be technically what in the eye of the common law is called waste, still it is that ameliorating waste which has been spoken of in several of the cases cited at the bar. That which is done, if it be technically waste — and here again I will assume in favor of the appellant that it is technically, according to the common law, waste — yet it seems to me to be that ameliorating waste which so far from doing injury to the inheritance, improves the inheritance. Now, there again, the course which the Court of Chancery ought undoubtedly to adopt would be to leave those who think they can obtain damages at common law to try what damages they can so obtain. Certainly, I think here again, the Court of Chancery would be doing very great injury to the one side for the purpose of securing to the other that slightest possible sum which would at common law be considered the full equivalent to which he was entitled. My lords, this was the view, in substance, taken by the Lord Chancellor of Ireland and the Lord Justice of the Court of Appeal, who in this respect differed from the Vice-Chancellor. I must say that I entirely concur with the decision at which they arrived, and therefore I would advise your lordships, and move your lordships, to dismiss this appeal with costs.

Lord O'Hagan. My lords, I am of the same opinion.

Now we have, I think, established for the purposes of this decision the principles in this case by which we ought to abide. In the case of Mollineux *v.* Powell, which contains perhaps the clearest dictum we have upon the matter, two conditions as to the exercise of jurisdiction in cases of waste have been very clearly pointed out, and one at

least of those conditions is expressly recognized afterwards in the Irish case of Coppinger *v.* Gubbins.[1] Those conditions are that the waste with which a court of equity, or your lordships acting as a court of equity, ought to interfere, should be not ameliorating waste, nor trivial waste. It must be waste of an injurious character — it must be waste of not only an injurious character, but of a substantially injurious character, and if either the waste be really ameliorating waste — that is, a proceeding which results in benefit and not in injury — the court of equity, and your lordships acting as a court of equity, ought not to interfere to prevent it. I think that is perfectly well established. On the other hand, if the waste be so small as to be indifferent to the one party or the other — if it be, as has been said by a great authority in our law, such a thing as twelvepence worth of waste, a Court of Equity, and your lordships acting as a Court of Equity, ought not to interfere on account of the triviality of the matter. — Now, in my view of the case, those principles decide the question so far as this portion of it is concerned; for it appears to me that we have here established to the full satisfaction of your lordships, by a series of authorities to which I shall not refer, that the waste, to be of any sort of effect with a view to an injunction, must be a waste resulting in substantial damage.[2] Your lordships are the judges not only of the propriety of exercising your discretion, but of the facts by which the exercise of that discretion ought to be regulated. Now, with reference in the first place to the materiality of the waste, we have in the analogy of proceedings in the courts of law a very important guide for the exercise of our equitable jurisdiction. It is established not only in the case of The Governors of the Harrow School *v.* Alderton,[3] before Lord Eldon, but in every case, that if there be a trial at law, and if the result of such trial is that the jury is compelled to give nominal damages, such as three farthings in that case, the verdict will be entered, not for the man who obtained the nominal damages, but for the defendant in the case.[4] It is rather an extraordinary jurisdiction, no doubt — it is an equitable jurisdiction exercised by a court of law — but it seems to be quite established and quite recognized, and being so I think it is impossible to say that when we come to exercise our jurisdiction, which is a discretionary jurisdiction, we should act upon any other principle, or to say that if we see that the damage has not really been substantial and important, we should do that in a court of equity according to our discretion, which even in the strictness of a court of common law is not done because of the reason given.

We have heard much comment on the one side and the other, with reference to the length of the term in this case. I do not rely upon that as the only circumstance in the case on which the judgment

1 3 J. & Lat. 411.
2 Barry *v.* Barry, 1 Jac. & W. 651 *Accord.* — Ed.
3 2 B & P. 86
4 Peirs *v.* Peirs, 1 Ves. Sr. 521; Sheppard *v.* Sheppard, 2 Hayw. N. Ca. 382 *Accord.* — Ed.

of the Court of Appeal should be sustained; but when, in a case of this sort, we are asked to exercise our discretionary jurisdiction, it surely is material to see that the interest of the individual who is only to come into possession of the premises at the end of 900 years is infinitesimally small compared with the interest of the man who is the tenant, and who, with his successors, is to hold the premises all that time, upon whom the effect of our exercise of this jurisdiction would be to tie up his hands, to destroy their property, and to inflict great damage upon them during the course of these many centuries that are yet to come. I think, that being so, we have only to say this in addition, that it is scarcely a matter of possible controversy here whether or no this change is a beneficial change. We have most conclusive evidence that the change will be beneficial. We have the most clear evidence that, as the matter stands, this old dilapidated store has become useless, I presume, to any human being. Circumstances have changed; the necessity for a store of that kind has ceased, and the result has been that the store, if it be allowed to continue in its present condition — because the parties are compelled to leave it in its present condition — till the end of this term of 999 years, the whole premises will be utterly valueless; whereas, upon the other side, if you substitute for this store the houses which are contemplated you double, you treble the security of the landlord, and give him, or whoever may live at the end of the term of 999 years, certainly not an injured property but an improved one. Therefore, inasmuch as the waste, if waste there be, is ameliorating waste, and the injury to the property produced by the waste is not merely trivial but absolutely non-existent, it appears to me that upon that ground the judgment of the court below may very fairly be maintained.

Now there was one case, I think it is the only case, referred to by the very able and learned judge who had this matter first before him, the case before Lord Romilly to which reference has been made from time to time, Smyth *v.* Carter,[1] which would be very strong authority if we are to take it as expressing, in the words that are used, the full opinion of that learned Lord, and an opinion reached with reference to facts which have analogy to the facts before your lordships. But in the first place, that was a mere *obiter dictum* of Lord Romilly. It was in an interlocutory proceeding. It was without any sort of argument; and the case has, I think, no application to the case before your lordships, and for this important reason, that in that case the observations may have been applied to the limited interest of a tenant from year to year, whereas we have to deal here with the interest of a tenant for 900 years. The circumstances are wholly different, the conditions are wholly unlike, and, therefore, the authority does not, in my opinion apply at all to the case before us.

But beyond all that, if the latter words of the dictum, that the landlord has a right to exercise his own judgment and caprice as to whether there shall be any change, were to be taken in their literal

[1] 18 Beav. 78.

sense, and as applicable to this case, the effect would be to make the landlord absolute arbiter of the fortune, good or ill, of his tenant with reference to these premises for a period of 900 years. Now, my lords, I for one should be prepared to exercise the jurisdiction of this house, and say that this is not and cannot be the law. Upon this ground I think that the judgment may now well be sustained.

Lord Blackburn delivered a concurring judgment.

Lord Gordon entirely concurred.

Order of the Court of Appeal in Ireland affirmed; and appeal dismissed with costs.

LORD CASTLEMAIN *v.* LORD CRAVEN.

Before Honorable John Verney, M. R., Michaelmas Vacation, 1733.

[22 *Viner's Abridgment*, 523, *placitum* 11.]

A., tenant for life, remainder to trustees to preserve, &c., remainder to C., the plaintiff in tail, remainder over, with power for A. with consent of trustees to sell timber, and the money arising to be invested in lands, &c., to same uses, &c. A. felled timber to the value of 3000*l.* without consent of trustees, who never intermeddled, and A. had suffered some of the houses to go out of repair. C., by bill, prayed an account and injunction.

The Master of the Rolls said that the timber may be considered under two denominations, (to wit) such as was thriving and not fit to be felled, and such as was unthriving, and what a prudent man and a good husband would fell, &c. And ordered the master to take an account, &c., and the value of the former, which was waste, and therefore belongs to the plaintiff, who is next in remainder of the inheritance, is to go to the plaintiff, and the value of the other is to be laid out according to the settlement, &c. But as to repairs, the court never interposes in case of permissive waste either to prohibit or to give satisfaction,[1] as it does in case of wilful waste; and where the court having jurisdiction of the principal, viz., the prohibiting, it does in consequence give relief for waste done,[2] either by way of account as

1 Wood *v.* Gaynor, Amb. 395; Powys *v.* Blagrave, 4 D. M. & G. 448, 458; *Re* Cartwright, 41 Ch. D. 532, 536; *Re* Parry, 1900, 1 Ch. 160 (tenant for life of leasehold); Cannon *v.* Barry, 59 Miss. 289 *Accord.*

Parteriche *v.* Powlet, 2 Atk. 383 *Contra.*

Nor is a tenant liable at law for permissive waste in the absence of an agreement to keep the premises in repair. *Re* Cartwright, 41 Ch. D. 532; Wolfe *v.* Maguire, 28 Ont. R. 45; Patterson *v.* Central Co., 29 Ont. R. 134. — Ed.

2 West Ham Board, 1900, 1 Ch. 624; Jungerman *v.* Bovee, 19 Cal. 354; Dennett *v.* Dennett, 43 N. H. 499, 503 *Accord.* — Ed.

for timber felled, or by obliging the party to rebuild, &c., as in case of houses, &c., and mentioned Lord Barnard's case as to Raby Castle. But as to the repairs, it was objected that the plaintiff here had no remedy at law, by reason of the estate for life to the trustees mean between plaintiff's remainder in tail and defendant's estate for life, and that therefore equity ought to interpose, &c., and that this was a point of consequence. Sed non allocatur.

ANONYMOUS.

Before Sir Thomas Egerton, L. K., 1599.

[*Moore*, 554, *placitum*, 748.]

Per Egerton, Keeper of the Great Seal, that he had seen a precedent in the time of Richard II., that where there is tenant for life, remainder for life, remainder over in fee, and therefore waste in the first tenant for life is dispunishable by the common law;[1] yet it has been decreed in chancery, by the advice of the judges, upon complaint of him in remainder in fee, that the first tenant shall not commit waste, and an injunction granted.[2]

[1] "No person shall have an action of waste unlesse he hath the immediate state of inheritance." Co. Lit. 53, b. "If a lease be made to A. for life, the remainder to B. for life, the remainder to C. in fee, in this case where it is said in the Register and in F. N. B. that an action of waste doth lie, it is to be understood after the death or surrender of B. in the mesne remainder, for during his life no action of waste doth lie." Co. Lit. 54, a. See to the same effect, Y. B. 48 Ed. III. 16–10; Y. B. 4 Ed. IV. 89; Crompt. Courts, 48–6; Poyne *v.* Docra, 2 Roll. Ab. 829, (E) 7; Udal *v.* Udal, Al. 81; 2 Roll. Ab. 119 [A. 3] s. c.; Abraham *v.* Bubb, Freem. C. C. 53, 54; Tracy *v.* Tracy, 1 Vern. 23; Perrot *v.* Perrot, 3 Atk. 94, 95; Robinson *v.* Litton, 3 Atk. 209, 210; Garth *v.* Cotton, 1 Ves. Sr. 545, 556; Kane *v.* Vanderburgh, 1 Johns. Ch. 11, 12; Selden *v.* Mann, 2 N. Y. Leg. Obs. 328, 329.

But in some of our States a remainderman or reversioner in fee or in tail may maintain an action on the case for waste committed by the first holder of the particular estate notwithstanding an intervening life estate. Short *v.* Piper, 4 Harringt. 181; Wilson *v.* Galey, 103 Ind. 257 (statutory); Van Deusen *v.* Young, 29 N. Y. 9 (statutory).

Waste committed by the first holder of the particular estate in the lifetime of the intermediate life-tenant is punishable after the latter's death by an action brought by the remainderman or reversioner in fee or in tail. Anon. Moo. 18, pl. 64; Perrot's Case, Moo. 368, 387; Paget's Case, 5 Rep. 76, b; Co. Lit. 54, a; Bray *v.* Tracy, Cro. Jac. 688, W. Jones, 51 s. c.; Roswell's Case (1619), 1 Roll. Ab. 377, pl. 13; Udal *v.* Udal, Al. 81, 82; Garth *v.* Cotton, 1 Ves. Sr. 546, 556; Seagram *v.* Knight, 2 Ch. Ap. 628, 632. — Ed.

[2] Roswell's Case (1619), 1 Roll. Ab. 377 pl. 13; Abraham *v.* Bubb, Freem. C. C. 53, 54; Tracy *v.* Tracy, 1 Vern. 23 (*semble*); Robinson *v.* Litton, 3 Atk. 209, 210; Farrant *v.* Lovel, 3 Atk. 723; Gwaltney *v.* Gwaltney, 119 Ind. 144; Dennett *v.* Dennett, 43 N. H. 499 *Accord.*

Similarly, a ground landlord may have an injunction to stay waste by an under lessee Farrant *v.* Lovel, 3 Atk. 723. — Ed.

MOLLINEUX *v.* POWELL.

BEFORE LORD KING, C., EASTER TERM, 1730.

[3 *Peere Williams*, 268 *n.* (*F.*)]

A., tenant for years, remainder to B. for life, remainder to C. in fee; A. is doing waste; B., though he cannot bring waste,[1] as not having the inheritance, yet he is entitled to an injunction.[2] See 1 Roll. Abr. Roswell's case, 377. But if the waste be of a trivial nature, and *a fortiori*, if it be meliorating waste, as by building on the premises, (see 1 Inst. 53) the court will not injoin; nor if the reversioner or remainderman in fee be not made a party, who possibly may approve of the waste.

LUTTEREL'S CASE.

BEFORE SIR ORLANDO BRIDGMAN, L. K., DECEMBER 1, 1670.

[*Precedents in Chancery*, 50, (*cited*).]

AND one Lutterel's case was cited in my Lord Bridgman's time, where a bill was exhibited on behalf of an infant in *ventre sa mère* to stay waste, and an injunction granted upon it.[3]

[1] Perrot *v.* Perrot, 3 Atk. 221; Williams *v.* Peabody, 8 Hun. 271; Mayo *v.* Feaster, 2 McC. Ch. 137, 142, 143 *Accord.*

But the learned editor of Saunders' Reports states that a remainderman for life or years may have an action on the case for waste committed by the holder of the particular estate. 2 Wms. Saund. 252, a. He cites no authorities, however, in support of this statement. Dicta to the same effect are to be found in Dickinson *v.* Mayor, 48 Md. 583, 589; Dennett *v.* Dennett, 43 N. H. 499, 502; Dozier *v.* Gregory, 1 Jones (N. Ca.) 100, 106; Dupree *v.* Dupree, 4 Jones (N. Ca.) 387, 390. — ED.

[2] Dayrell *v.* Champness, 1 Eq. Ab. 400, pl. 4, 1 Dick. 197 cited s. c. (owner of inheritance not made a party); Perrot *v.* Perrot, 3 Atk. 94; Davies *v.* Leo, 6 Ves. 784, 787; Birch-Wolfe *v.* Birch, 9 Eq. 683; Kane *v.* Vanderburgh, 1 Johns Ch. 11; Williams *v.* Peabody, 8 Hun. 271; Smith *v.* Daniel, 2 McC. Ch. 143.

But a tenant for life, who has made a lease of coal mines, cannot in disaffirmance of his own lease have an injunction to restrain the lessee from working the mines; Wentworth *v.* Turner, 3 Ves. Jr. 3 *Accord.*

Trustees to preserve Contingent Remainders, being tenants *pur auter vie*, while unable to maintain an action at law for waste (Garth *v.* Cotton, 1 Ves. 546, 555) may obtain nevertheless an injunction against waste. Garth *v.* Cotton, 1 Ves. 546, 555; Perrot *v.* Perrot, 3 Atk. 94, 95; Lansdowne *v.* Lansdowne, 1 Madd. 116, 137; Birch-Wolfe *v.* Birch, 9 Eq. 683, 689. — ED.

[3] Wallis *v.* Hodson, 2 Atk. 214, 217; Robinson *v.* Lytton, 3 Atk. 209, 211; Garth *v.* Cotton, 1 Ves. 546, 555 *Accord.* — ED.

BISHOP OF WINCHESTER'S CASE.

Prior to 1638.

[1 *Rolle, Abridgment,* 380 (*T,* 3.) [1]]

If a lessee for years, without impeachment of waste, about the end of his term, intends to cut down all the timber trees, an injunction lies out of a court of equity upon this matter, to stop the cutting down of the trees notwithstanding the agreement of the parties, because it is against the public good to destroy the trees, and the suit is to hinder and prevent it, and not to have damages after it is done.[2]

[1] Freem. C. C. 55 (cited) s. c.

[2] In Micklethwait *v.* Micklethwait, 1 DeG. & J. 504, 524 Lord Justice Turner said: "This doctrine of equitable waste, although far too well settled in the court to be now in any way disturbed is (it is to be observed) an encroachment upon a legal right. At law a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate, but this court controls him in the exercise of that power, and it does so, as I apprehend, upon this ground, that it will not permit an unconscientious use to be made of a legal power. . . . If a devisor or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed. This court, therefore, in such a case protects the trees against the acts of the tenant for life."

In Downshire *v.* Sandys, 6 Ves. 107, Lord Eldon said: "The principle upon which the court has gone seems to be, that if the testator or the author of the interest by deed had gratified his own taste by planting for ornament, though he had adopted the species the most disgusting to the tenant for life, and the most agreeable to the tenant in tail, and upon the competition between those parties the court should see that the tenant for life was right, and the other wrong, in point of taste, yet the taste of the testator, like his will, binds them; and it is not competent to them to substitute another species of ornament for that which the testator designed. The question which is the most fit method of clothing an estate with timber for the purpose of ornament cannot be safely trusted to the court. The principle has been extended from ornament of the house to outhouses and grounds, then to plantations, vistas, avenues, to all the rides about the estate for ten miles round. If that principle has been rightly applied it is very difficult in argument to say it cannot be applied to a common as well as in field lands; and that the contiguity or remoteness, if *de facto* it was planted for ornament, can alter the principle upon which the rule of the court is to be applied."

An injunction to restrain the commission of equitable waste by a tenant unimpeachable for waste was granted in the following cases. Lawley *v.* Lawley, Jac. 71 n. b. (cutting trees an ornament or shelter to the house); Bishop *v.* Webb, 1 P. Wms. 527 (lessee for years about to remove clay to depth of six feet from several acres); Packington's Case (1744) 3 Atk. 215, (1745) Dick. 101 (cutting down ornamental and sheltering trees); Aston *v.* Aston, 1 Ves. Sr. 264 (cutting saplings); O'Brien *v.* O'Brien, Amb. 107 (cutting ornamental trees and saplings); Kaye *v.* Banks, Dick. 431 (cutting down saplings, wavers, and fruit trees); Chamberlayn *v.* Dummer, 1 Bro. C. C. 166 (cutting saplings); Strathmore *v.* Bowes, 2 Bro. C. C. 88, 1 Cox, 263 s. c. (cutting ornamental timber and saplings); Downshire *v.* Sandys, 6 Ves. 107 (cutting ornamental timber some miles from the house); Tamworth *v.* Ferrers, 6 Ves. 419 (cutting ornamental timber and cutting in an unhusbandlike manner); Williams *v.* McNamara, 8 Ves. 70 (cutting timber standing for ornament or shelter); Lord Mahon *v.* Lord Stanhope, 3 Madd. 523 n. (o) (*semble* — cutting timber left standing for ornament); Allard *v.* Jones, 15 Ves. 605 (cutting ornamental timber and saplings); Day *v.* Merry, 16 Ves. 375 (cutting ornamental timber and trees planted to exclude certain objects from view); Coffin *v.* Coffin, Jac. 70 (cutting ornamental timber); Brydges *v.* Stephens, 6 Madd. 279 (cutting immature underwood); Wombwell *v.* Belasyse, 6 Ves. (2d ed.) 110, a,

Mich. 14 Car. B. R. in the said case of Salway said by BRAMPSTON, [C. J.] that this was the Bishop of Winton's case which was referred out of Chancery to the judges and by their advice an injunction granted for the cause aforesaid.

VANE *v.* LORD BARNARD.

BEFORE LORD COWPER, C., JANUARY 24, 1716.

[2 *Vernon*, 738.[1]]

THE defendant, on the marriage of the plaintiff his eldest son with the daughter of Morgan Randyll, and 10,000*l.* portion, settled (*inter alia*) Raby Castle on himself for life, without impeachment of waste, remainder to his son for life, and to his first and other sons in tail male.

The defendant the Lord Barnard, having taken some displeasure against his son, got two hundred workmen together, and of a sudden, in a few days, stript the castle of the lead, iron, glass-doors, and boards, &c., to the value of 3000*l.*

The court, upon filing the bill, granted an injunction to stay committing of waste, in pulling down the castle; and now, upon the hearing of the cause, decreed, not only the injunction to continue, but that the castle should be repaired, and put into the same condition it was in, in August, 1714, and for that purpose a commission was to issue to ascertain what ought to be repaired, and a master to see it done at the expense and charge of the defendant the Lord Barnard; and decreed the plaintiff his costs.

note (cutting ornamental timber); Wellesley *v.* Wellesley, 6 Sim. 497 (cutting ornamental and sheltering trees); Newdigate *v.* Newdigate, 2 Cl. & F. 601 (same as preceding case); Morris *v.* Morris, 11 Jur. 196 (same as preceding case); Ford *v.* Tynte, 2 D. J. & S. 127 (timber left standing for ornament); Ashby *v.* Hincks, 58 L. T. Rep. 557 (cutting ornamental or sheltering timber); Marker *v.* Marker, 9 Hare, 1, 21 (timber left standing for ornament); Pentland *v.* Somerville, 2 Ir. Ch. 289 (cutting saplings); Bedoyere *v.* Nugent, L. R. 25 Ir. 143 (timber left standing for ornament, although not near the house); Duncombe *v.* Felt, 81 Mich. 332 (stripping land of all its timber); Clement *v.* Wheeler, 25 N. H. 361 (*semble* — cutting ornamental timber); Kane *v.* Vanderburgh, 1 Johns. Ch. 11, 12 (*semble*).

In the following cases the threatened acts of the defendant not amounting to equitable waste, he was not restrained by injunction. Mahon *v.* Stanhope, 3 Madd. 523 n. (cutting to remedy effects of a tempest); Burges *v.* Lamb, 16 Ves. 174 (cutting valuable timber); Smythe *v.* Smythe, 2 Sw. 251 (cutting timber); Kekewich *v.* Marker, 9 Hare, 10-12 (cutting timber); Micklethwait *v.* Micklethwait, 1 DeG. & J. 504 (cutting timber, originally ornamental, after removal of mansion-house); Halliwell *v.* Phillips, 4 Jur. n. s. 607 (cutting timber not planted or left standing for ornament, although in fact ornamental); Baker *v.* Seabright, 13 Ch. D. 179 (cutting ornamental trees for the benefit of those that are left); Findlay *v.* Smith, 6 Munf. 134 (cutting timber). — ED.

[1] Prec. Ch. 454, Gilb. Eq. 127, 1 Salk. 161 s. c.

ROLT *v.* LORD SOMERVILLE.

Before Lord Hardwicke, C., Trinity Term, 1737.

[2 *Equity Cases Abridged*, 759, *placitum* 8.]

The case in effect was thus: — A very considerable real estate was limited to Mrs. Rolt (who afterwards married the defendant, the Lord Somerville) for life, without impeachment of waste, remainder to plaintiff Rolt for life, without impeachment of waste, with several remainders over. The defendant, the Lord Somerville, to make the most of this estate during the life of his wife, pulled down several houses and outbuildings upon the estate, and sold the same, and also took up lead water pipes that were laid for the conveyance of water to the capital messuage, and disposed thereof, and he also cut down several groves of trees that were planted for the shelter or ornament of the capital messuage. Upon this a bill was brought by the plaintiff to compel the defendant to account for the money raised by the particulars before mentioned, and to put the estate in the same plight and condition that it was before. To this the defendant demurred, and thereby insisted that this waste was committed by tenant for life without impeachment of waste, and therefore he was not liable to be called to an account for what he had done either in law or equity, and if he was, yet the plaintiff could not call him to an account, because he was not a remainderman of the inheritance.

Lord Chancellor Hardwicke: Though an action of waste will not lie at law for what is done to houses, or plantations for ornament or convenience, by tenant for life without impeachment of waste, yet this court hath set up a superior equity, and will restrain the doing such things on the estate. In Lord Barnard's case the court restrained him from going on, and ordered the estate to be put in the same condition. In Sir Blundel Charleton's case the Master of the Rolls decreed that no trees should be cut down that were for the ornament of the park; but Lord Chancellor King reversed that, and extended it only to trees that were planted in rows. My only doubt is as to the trees that have been cut down, for if this bill had been brought before such trees had been cut down as were for the ornament or shelter of the estate, this court would have interposed; but here the mischief is done, and it is impossible to restore it to the same condition as to the plantations, and therefore it can lie in satisfaction only; and I cannot say the plaintiff is entitled to a satisfaction for the timber which is a damage to the inheritance, yet as to the pulling down the houses and buildings, and laying the lead pipes, they may be restored, or put in as good condition again. In the case of my Lord Barnard there were directions for an issue at law to charge his assets with the value of the damages, he not having performed the decree in his lifetime. The demurrer was allowed as to satisfaction on account of the timber, but overruled as to the rest.

ANONYMOUS.

BEFORE SIR JOSEPH JEKYLL, M. R., DECEMBER 4, 1729.

[*Mosely*, 237.]

TENANT for life, without impeachment of waste, remainder to his first, and every other son in tail, becomes a bankrupt, and a commission is taken out against him, and the commissioners sell his estate to the defendant, against whom the son of the bankrupt, on certificate of his bill being filed, and affidavit, obtains an injunction to stay waste, which upon coming in of the answer was to be dissolved nisi, and the plaintiff showed for cause, that he, as tenant in tail, had a right to enjoin any one from committing waste, but the tenant for life himself, and even him in a court of equity, from pulling down the mansion-house, or cutting down timber ornamental to it, though he has a power by law. —

MASTER OF THE ROLLS. The injunction must be continued as to pulling down the mansion-house, or cutting down the timber ornamental to it; but dissolved, as to cutting of timber generally, for though there have been great variety of opinions formerly, it is now settled at law that if a stranger cut down timber, or commit any other waste, it belongs to the tenant for life,[1] who is dispunishable of waste, and not to the remainderman in tail or in fee.

SAVILE'S CASE.

BEFORE LORD KING, 1725–1729.

[*Cases tempore Talbot*, 16 (*cited*).[2]]

Per LORD TALBOT, C. That [*i. e.* an injunction] was refused in Mr. Savile's case of Yorkshire; who, being an infant and tenant in tail in possession, in a very bad state of health, and not likely to live to full age, cut down by his guardian a great quantity of timber just before his death, to a very great value; the remainderman applied here for an injunction to restrain him, but could not prevail.[3]

1 Bishop *v.* Web, 1 P. Wms. 527; Pyne *v.* Dor, 1 T. R. 55; Williams *v.* Williams, 15 Ves. 419, 425; Clement *v.* Wheeler, 25 N. H. 361, 365 *Accord*. But only if his estate is in possession. Pigot *v.* Bullock, 1 Ves. Jr. 479; Gent *v.* Harrison, Johns. 517, 525, Bewes, waste, 151. — ED.

2 1 Ves. Sr. 546, 548 cited, Mos. 224 cited s. c. — ED.

3 Clavering *v.* Clavering, Mos. 219; Lyddal *v.* Clavering, Amb. 371, n. 4; Tullitt *v.* Tullitt, Amb. 370 (*semble*); Atty.-Gen. *v.* Marlborough, 3 Madd. 498, 531; Turner *v.* Wright, *infra*, 476 *Accord*. — ED.

SKELTON *v.* SKELTON.

Before Lord Finch, C., November 16, 1677.

[2 *Swanston*, 170.]

The bill was exhibited against a jointress to stay *maresme* in felling timber, and notwithstanding the defendant's answer, who claimed the inheritance by a deed which the plaintiff controverted, an injunction was obtained until hearing; and now, at the hearing, she proved herself to be a jointress in tail; and it was urged by Mr. Attorney, that the defendant being a jointress within the statute of 11 H. 7., which restrains all power of alienation by fine or discontinuance, she ought likewise to be restrained in equity from committing waste, which is also in disherison of the heir. But this I would by no means allow, that equity should enlarge the restraints of the disabilities introduced by act of parliament; and as to the granting of injunctions to stay waste, I took a distinction where the tenant hath only *impunitatem*, and where he hath *jus in arboribus*. If the tenant have only a bare indemnity, or exemption from an action if he committed waste, there it is fit he should be restrained by injunction from committing it; but if he have a right in the thing itself, when it is wasted and cut down, there is no way reasonable that he should be restrained; as, for example, if there be tenant for life, the remainder for life, the reversion in fee; here the tenant for life has no right nor power to fell timber or commit waste; yet if he do so he cannot be punished for it in an action of waste, during the life of him in the remainder for life; for that intervening remainder is an impediment to the action; so it is most just to grant an injunction to stay waste; and so it was ruled in the chancery by advice of judges, P. 41 El. Sir F. Moor, 554, pl. 748; and Egerton, C., said he had seen a precedent of such an injunction, 5 R. 2, and so it had been done before, temp. E. 6. Vandemot *v.* Eyr: and with this agrees 16 Jac. B. R., 1 Roll. 377, pl. 13, *per curiam*. And the reason of this is most convincing; for when such a tenant for life hath cut down the trees, he in the remainder in fee may take them away, notwithstanding the mean remainder for life, or he may have a trover and conversion against the tenant for life, if he remove them;[1] which shows that such tenant for life hath no property in the trees; it were, *ergo*, most absurd to put the reversioner to recover damages for his inheritance in the trees, or to seize them as chattels, when they may better be preserved to him in specie, by granting an injunction to stay the felling of them. And upon the like reason it may seem that tenant after possibility may be

1 Paget's Case, 5 Rep. 76, b; Udal *v.* Udal, Al. 81, 2 Roll. Ab. 119 s. c.; Abraham *v.* Bubb, Freem. C. C. 53, 54; Whitfield *v.* Bewit, 2 P. Wms. 240, 241; Bewick *v.* Whitfield, 3 P. Wms. 267; Garth *v.* Cotton, 3 Atk. 751, 755; Short *v.* Piper, 4 Harringt. 181 *Accord.* — Ed.

restrained by injunction from committing waste, for so if he fell trees the reversioner may have a trover and conversion, as was held 24 Car. 1. B. R. Udal *v.* Udal's case, p. *Rolle et curiam*;[1] and yet *temp.* E. R. *placita* parliament. Ryley, Appendix, 653. Kirbrok petitions *quod breve de waste poet giser versus* Roger *son frere* (against Maud, the widow of Roger) "tenant in tail, *apres possibilité; Response, ley nest mye uncore ordein en ce cas.*" Probably this was before 21 Ed. 3, for in 21 Ed. 3, Rot. Parl., n. 46, the commons petition for a general law, that tenant after possibility might be liable to an action of waste, as being in effect but tenant for life, yet could not obtain it; but this serves only to keep the tenant after possibility in a state of impunity, if he commit waste, not to give him a right to commit it. On the other side, if there be tenant for life, with an express charge to hold without impeachment of waste, he is not to be restrained by injunction, for he hath more than a bare impunity, viz., a right in the trees to fell them; *a fortiori*, in the case in question, no restraint can be put upon a jointress in tail who hath the inheritance; and yet all this notwithstanding, he that hath a lawful power and liberty to commit waste may be restrained by chancery from using this power, when the waste which he is about to do is signally *contra bonum publicum.* V. 19 Car. 1 B. R. 1 Roll. 380, T. 3, though a lease for years was made without impeachment of waste by the bishop of Winchester, yet when the lessee for years, towards the end of his term, was about to cut up all the trees, an injunction was awarded by the advice of all the judges, *pro bono publico*, and in favor of the church, whereof the king is patron, notwithstanding the agreement of the parties. But in my Lord of Orford's case, where the earl was tenant for life without impeachment of waste, the reversion in fee to the co-heirs of the Lady Banning, and the earl was about to pull down a house near Colchester, no injunction could be obtained, but the co-heirs and Sergeant Peck, who was a purchaser from one of them, were fain to compound with the earl. So it seems there is some discretionary latitude in these cases; but that which is more remarkable is, that he who hath a power to commit waste may sometimes be restrained from the exercise of that power, when it tends only to a private damage; as for example, the Lady Evelyn was tenant for life in jointure, remainder to Sir John Evelyn, her eldest son, for life, without impeachment of waste, with several remainders over; the jointress let the land to a tenant at will; Sir John Evelyn enters by consent of the undertenant, and cuts down trees; resolved, though no injunction had lain against Sir John Evelyn if his remainder had fallen into possession, yet now it does; for although the license of tenant at will to enter excuse the entry from being a trespass, yet no possession by such entry can enable him to cut down the trees presently, for the

[1] As pointed out by the reporter in Williams *v.* Williams, 12 East, 216, n. (b), Lord Finch was under a misapprehension as to the judgment in Udal *v.* Udal. That was not a case of tenant in tail after possibility, but a case of trover by a tenant in tail for timber cut by a tenant for life. — Ed.

jointress hath right during her life to the shade and the mast; and to reasonable bootes; *ideoque* Lord Bridgman, Custos, awarded an injunction during the life of the jointress. 1 Dec. 1670, 22 Car. 2. Lord Nottingham's MSS. "This court sees no color of cause to give the said plaintiff any relief in this court, and doth therefore think fit and order that the matter of the said plaintiff's bill be from henceforth clearly and absolutely dismissed out of this court; and it is hereby referred to Sir J. F. &c. to tax the said defendants their moderate costs of this suit." Reg. Lib. B. 1677, fol. 33.[1]

ABRAHALL *v.* BUBB.

Before Lord Finch, C., July 1, 1679, May 27, 1680.

[2 *Swanston*, 172.[2]]

The bill supposed the defendant's wife to be tenant in tail after possibility, by the provision of a former husband, and prayed she might be restrained from committing waste; the defendant demurred;[3] yet I ordered him presently to answer *quoad* the house and trees about it, *pro bono publico;* but the next morning I ordered him to answer the whole bill, upon the reason of the case, Skelton *v.* Skelton, because tenant after possibility has only *impunitatem*, not *jus in arboribus*, for he in reversion may have a trover when they are felled.

The importunity of the parties being great, I restrained only mischievous waste, which might deface the seat, but gave way that trees marked out by the ancestor for payment of his debts might be felled; yet I continued in the same opinion, that where he in the reversion might have a trover for the trees when felled, there the court ought to grant an injunction to stay the felling, and that I took to be this case;[4] and I observed that the opinion that tenant after possibility is dispunishable of waste, was an addition to Mr. Littleton, and no part of the original text; but, however, it is one thing to have impunity, and another to claim right in the trees; the very act of the party who

1 Compare Atty.-Gen. *v.* Marlborough, 3 Madd. 498. — Ed.

2 Freem. C. C. 53, 2 Show. 69, 2 Eq. Ab. 757 s. c. — Ed.

3 The statement of the case is given more fully in Freem. C. C. 53, as follows: "One Abraham (to whom the plaintiff is heir), upon his marriage did settle the lands, upon which the waste in question was intended to be committed, to the use of himself and his wife, and the heirs of their two bodies; afterwards the husband dieth without issue, his wife being then tenant in tail after possibility of issue extinct, marrieth the defendant; and she and her second husband having felled some trees in a grove that grew near, and was an ornament to the mansion house, and having an intent to fell the rest, the plaintiff, to whom the land did belong in remainder, preferred his bill to restrain her from felling those trees, and to have an injunction to stay the committing of waste." — Ed.

4 It is now settled, contrary to the inclination of Lord Nottingham, that tenant in tail after possibility extinct, like a tenant unimpeachable for waste, is not liable in trover for timber cut by him during his tenancy. Williams *v.* Williams, 12 East, 209. See also Williams *v.* Williams, 15 Ves. 419, 427. — Ed.

grants an estate without impeachment of waste, has not always been understood to transfer a property in the trees, as may appear by Herlakenden's case; and so at this day, the usual form of conveyances is, after the words without impeachment of waste, to add a clause, and with full power and authority to do and to commit waste, which shows that this is taken to be somewhat more than the former words do necessarily imply; and the case is put in my Lord Dyer, where an estate without impeachment of waste was granted upon condition not to commit voluntary waste, and held to be a good condition, and consistent with the grant. If the act of the party be so tenderly construed to prevent waste, the act of the law ought to be bounded with more circumspection. But hereafter, when any such case shall happen again, it may be fit to direct that a trover and conversion be brought for felling some oaks, which shall be admitted to be cut; and as the law shall be judged in a trover, accordingly to grant or deny a perpetual injunction, and in the mean time to stay waste. Lord Nottingham's MSS.

WILLIAMS *v.* DAY.

Before Lord Finch, C., June 18, 1680.

[2 *Cases in Chancery*, 32.]

The Lord Chancellor declared that he would stop pulling down houses, or defacing a seat by tenant after possibility of issue extinct,[1] or by tenant for life who was dispunishable of waste by express grant, or by trust.

TURNER *v.* WRIGHT.

Before Lord Campbell, C., July 21, 1860

[2 *De Gex, Fisher, and Jones*, 234.]

The Lord Chancellor.[2] In this case the plaintiff, by his bill, prayed an injunction "to restrain the cutting of any timber, or at any rate of any ornamental timber," growing upon the lands devised in fee to the defendant, subject to an executory devise over to the plaintiff.

The decree of the Vice-Chancellor declared, "that the defendant is entitled to fell all such timber on the devised estates as is mature and fit to be cut, except such as has been planted or left standing by

[1] Cooke *v.* Whaley, 1 Eq. Ab. 400, pl. 5, 3 Madd. 529–530, cited, s. c.; Anon. Freem. C. C. 278, pl. 349; Atty.-Gen. *v.* Marlborough, 3 Madd. 498, 539 *Accord.* — Ed.

[2] Only the judgment of the court is given. — Ed.

way of ornament or shelter with reference to the occupation of the mansion-house on the said devised estates; but that he is not entitled to fell any unripe timber or any timber planted or left standing for ornament or shelter as aforesaid."

The result of the decision is, that the defendant is dispunishable of legal, but not of equitable, waste. After great consideration, I agree with the Vice-Chancellor on both questions.

As to the first, my opinion is clear and decided. The defendant is tenant in fee-simple, with all the incidents of such an estate, although there be executory devises over in case he should die without leaving issue living at the time of his decease. Not making any unconscientious use of the powers belonging to him as tenant in fee-simple, why should he not reasonably exercise these powers? Is there anything unconscientious or unreasonable in his cutting down timber mature and fit to be cut, and not such as has been planted or left standing by way of ornament or shelter? If we are to regard the intention of the testator in such limitations, can the intention be supposed to be, that the first taker, who is made tenant in fee, should during the whole of his life, although he should have numerous children and grandchildren, not be entitled to cut down a tree upon the property, unless for his botes? In this case, the presumed intention of the testator is strengthened by the first executory devise over, which is for life and sans waste. He could not have intended that the first taker, to whom he gave a fee, should be more restricted in the management of the property than the devisee over, to whom he gave only a life estate. Having given the first taker a fee, he probably thought it quite unnecessary expressly to make him dispunishable of waste.

So that equitable waste is not committed, the bountiful intention of the testator in favor of the devisees over will be completely fulfilled; for, on the happening of the contingencies limited, the property will come to them in the same condition in which it would have been if the testator, being a prudent man, had himself survived and had managed and enjoyed it till the time when the events happen upon which they are entitled to enter.

The *onus* seems to lie upon the plaintiff to show, by authority, that tenant in fee-simple, subject to an executory devise over, is not entitled to cut timber. It is admitted that no express decision to this effect is to be found in the books, and that no instance has ever yet occurred of an adult devisee in fee with an executory devise over being restrained.

The plaintiff's counsel relied on *dicta* to be found in the reports of three cases: Robinson *v.* Litton,[1] Stansfield *v.* Habergham,[2] and Wright *v.* Atkyns.[3] According to Vesey, Jr., a very careful and accurate reporter, Lord Eldon did say, in Stansfield *v.* Habergham,[4]

[1] 3 Atk. 209; Cru. Dig. tit. xvi. c. 7, § 26.
[2] 10 Ves. 273.
[3] 17 Ves. 255; 19 Ves. 299; 1 Ves. & Bea. 313; Turn. & Russ. 143.
[4] 10 Ves. 273.

"I should by dissolving this injunction contradict what has been understood to be the doctrine of this court; that, where there is an executory devise over, even of a legal estate, this court will not permit the timber to be cut down." But this doctrine is not to be found in any text writer, and it has never been acted upon. In Wright *v.* Atkyns,[1] the power of the widow to cut down timber was only questioned upon the supposition that she took no more in equity than an estate for life. In Robinson *v.* Litton,[2] Lord Hardwicke was influenced by the consideration that the tenant in fee-simple with an executory devise over was the infant heir of the testator, and was about to cut down timber improvidently. The limitation was as stated by Cruise;[3] and the infant, though seised of the legal estate in fee, was entitled to the rents and profits only until he attained twenty-one, *i. e.*, for a chattel interest. After that he was to become trustee for his sisters; and, even according to the report in Atkyns, the circumstance of the infant being a trustee for the benefit of his sisters was mainly relied upon in granting the injunction.[4]

Therefore, as to legal waste, I think there is no authority to outweigh the considerations which, upon principle, lead strongly to the conclusion that, so far, the injunction ought to be dissolved.

Had there been a charge in the bill, supported by evidence, that the cutting down of the ornamental and immature timber was malicious, I should have entertained no doubt that this court ought to interfere by injunction. Tenant in fee-simple, subject to an executory devise over, of a mansion surrounded by timber for shelter and ornament, cannot say that the property is his own; so that out of spite to the devisee over, he may blow up the mansion with gunpowder and make a bonfire of all the timber. The famous Raby-Castle Case[5] shows that such things may not be done by tenant for life sans waste, and tenant in fee with an executory devise over, actuated by malice, would not have greater liberty to destroy.

The waste which intervenes between what is denominated legal waste and what is denominated malicious waste, viz., equitable waste, may admit of a different consideration. But equitable waste is that which a prudent man would not do in the management of his own property. This court may interfere where a man unconscientiously exercises a legal right to the prejudice of another; and an act may in some sense be regarded as unconscientious if it be contrary to the dictates of prudence and reason, although the actor, from his peculiar frame of mind, does the act without any malicious motive. The prevention of acts amounting to equitable waste may well be considered as in furtherance of the intention of the testator, who, no doubt, wished that the property should come to the devisee over in the con-

[1] 17 Ves. 255; 19 Ves. 299; 1 Ves. & Bea. 313; Turn. & Russ. 143.
[2] 3 Atk. 209; Cru. Dig. tit. xvi. c. 7, § 26.
[3] 6 Cruise, 428, 429.
[4] 3 Atk. 209.
[5] Vane *v.* Lord Barnard, 2 Vern. 738.

dition in which he, the testator, left it at his death; the first taker having had the reasonable enjoyment of it, and having managed it as a man of ordinary prudence would manage such property were it absolutely his own. In the present case, the devise being by the testator of "all his said mansion-house and estate at Brattleby and North Kelsey, with the appurtenances," there would be great difficulty in distinguishing for this purpose between the mansion-house and the ornamental timber. Indeed, Mr. Daniel contended that, in the absence of malice, this court could not interfere to protect the mansion-house. I put to him hypothetically, in the course of his able argument, the supposition that a mediæval castle is devised to A. in fee, subject to an executory devise over to B. in fee, and that A., from a sincere dislike of turrets and moats, and a genuine love of roses and lilies and gravel walks, and believing that B. and all other sensible men must have the same taste, declares that he means to throw down all the buildings and to convert the site of the castle into a flower-garden, and begins with setting men to strip the lead from the roof of the donjon tower. A bill being filed by B. for an injunction, would this court interfere? Mr. Daniel answered: "A. acting *bona fide*, — No." Nevertheless, I cannot help thinking that in spite of A.'s *bona fides*, what A. contemplated would be in the nature of a destruction of the subject devised, and would certainly be in contravention of the intention of the devisor, so that B. would be entitled to an injunction. It may be said that this is an extreme case, but it is by an extreme case that the soundness of a principle is to be tested. The presence or absence of a bad motive will not alone enable us to draw any satisfactory line between what is to be considered malicious and what is to be considered equitable waste, and no line to regulate the interposition of a court of equity by injunction can well be drawn other than the recognized and well-established line between legal and equitable waste. The application of this to the facts of particular cases may sometimes be attended with difficulty; but the principle on which the line is to be traced is known and invariable.

I am willing, with Vice-Chancellor Page Wood, to accept the clue by which Lord Justice Turner, in Micklethwait *v.* Micklethwait,[1] proposed to solve the difficulty: "If a devisor or settlor occupies a mansion-house, with trees planted or left standing for ornament around or about it, or keeps such a mansion-house in a state for occupation, and devises or settles it so as to go in a course of succession, he may reasonably be presumed to anticipate that those who are to succeed him will occupy the mansion-house; and it cannot be presumed that he meant it to be denuded of that ornament which he has himself enjoyed." However, I cannot go so far as the Vice-Chancellor, who is reported to have added: "This reasoning obviously applies to every case of an estate limited so as to go in a course of succession." "The tenant for life, sans waste, is as much owner of the

[1] 1 De G. & J. 504, 524.

timber as the tenant in fee. Their legal rights in this respect are identical."[1] Where an estate tail is created with successive estates tail in remainder, the estate entailed is "limited to go in a course of succession," but a tenant in tail is dispunishable of equitable as well as legal waste, because he may at any time bar the entail, and give himself a pure and absolute fee-simple. Again, a tenant for life sans waste can hardly be said to be as much owner of the timber as the tenant in fee; for although the tenant for life (avoiding equitable waste) may fell and dispose of the timber in his lifetime, were he to sell growing trees they would go to the remainder-man or reversioner, if not severed from the soil in his lifetime; whereas the tenant in fee might by sale or conveyance give the purchaser an absolute and permanent interest in the trees against all the world. Nevertheless I think that the rights and liabilities of tenant for life sans waste may be taken as a measure of the rights and liabilities of devisee in fee, subject to an executory devise over.

The only analogy at all unfavorable to this view of the case is that of tenant in tail, with the reversion in the crown, and tenant in tail under an Act of Parliament which precludes the barring of the entail. Such tenants in tail are considered dispunishable of waste; this being an incident of tenancy in tail, probably arising from the power which generally subsists of barring the entail, and it not having been thought fit to make an exception in respect of those rare cases in which the power of barring the entail is withheld. But in the Marlborough Case,[2] although the court would not interfere on the mere ground that the tenant in tail was prohibited by statute from barring the entail; yet, having regard to the enactment "that Blenheim House should in all times descend and be enjoyed with the honors and dignities of the family," it was held that the court ought to interfere not only to prevent the destruction of the house, but also to protect the timber essential to the shelter and ornament of the house.[3]

There is an analogy which entirely accords with the distinction made by the Vice-Chancellor in this decree between legal and equitable waste, viz., the case of "tenant in tail after possibility of issue extinct," who is dispunishable of legal waste in respect of the estate of inheritance which was once in him, but may be restrained by injunction from committing equitable waste, this being an abuse of his legal power.

For these reasons I think that the decree of the Vice-Chancellor, as he pronounced it, should in all respects be affirmed, and that the appeal must be dismissed with costs.[4]

[1] Turner *v.* Wright, John. 740–751.

[2] 3 Madd. 498.

[3] 3 Madd. 549.

[4] Brashear *v.* Macey, 3 J. J. Marsh, 89; Gannon *v.* Peterson, (Illinois, 1901) 62 N. E. R. 210 (*semble*); Gordon *v.* Lowther, 75 N. Ca. 193; Coward *v.* Meyers, 99 N. Ca. 198; Farabow *v.* Green, 108 N. Ca. 339 *Accord.*

Matthews *v.* Hudson, 81 Ga. 120 *Contra.* — Ed.

JESUS COLLEGE *v.* BLOOM.

Before Lord Hardwicke, C., November 4, 1745.

[*Ambler*, 54.[1]]

This bill was brought by the Master and Fellows of Jesus College, in Oxford, for an account of timber cut down on the premises by them let to the defendant, and for an account of some stones which he had carried off the land.

Lord Chancellor. This is the most extraordinary bill that ever was brought in this Court, and I hope never to see one of the like nature again.

On this bill there arise two questions: 1st, Whether bills are to be maintained in this Court merely for timber cut down after the term is gone out of the tenant by assignment? or, Whether such bills can only be brought for an account of such waste done, without at the same time praying an injunction? And I am of opinion that they cannot. Waste is a loss for which there is a proper remedy by action; in a court of law the party is not necessitated to bring an action of waste, but he may bring trover; those are the remedies, and therefore there is no ground of equity to come into this Court, for satisfaction of damages is not the proper ground for the Court to admit of these sort of bills, but the staying of waste; because the Court presumes, when a man has done waste he may commit the same again, and therefore will suffer the lessor or reversioner, when he brings his bill for an injunction to stay waste, to pray at the same time an account of the waste done; for though a court of law may give damages, yet it cannot prevent further waste: and it is upon this ground, to prevent multiplicity of suits, that this Court will decree an account of waste done at the same time, with an injunction;[2] just like the case of a bill brought for discovery of assets, an account may be prayed at the same time; and though originally the bill was only brought for a discovery of assets, yet, to prevent multiplicity of suits, the Court will direct an account to be taken.

If the Court were to allow of these sort of bills, it would create infinite vexation: there is not one precedent to warrant it. The cases cited do not come up to the present. Whitfield *v.* Bewick. It does not appear in that case that an injunction to stay waste generally was not prayed; if it was, that brings it within the common case. As to the case of the Bishop of Winchester *v.* Knight, I am at a loss to know upon what grounds the Court went. The book says, because it was a demand against an executor;[3] but I doubt greatly as to this,

[1] 3 Atk. 262 s. c. — Ed.

[2] Castleman *v.* Craven, *supra*, 466, n. 2; West Board *v.* East Co., 1900, 1 Ch. 624; Jungerman *v.* Bovee, 19 Cal. 354; Dennett *v.* Dennett, 43 N. H. 499, 503 *Accord.* — Ed.

[3] A bill for an account of waste by the deceased was allowed against his executor in Winchester *v.* Knight, 1 P. Wms. 406; Thomas *v.* Oakley, 18 Ves. 184 (*semble*); Seagrave *v.* Knight, 2 Ch. Ap. 628 (but see Higginbotham *v.* Hawkins, 7 Ch. 676). — Ed.

for it is far from being a general rule of this Court to entertain a bill against an executor for a tort committed by his testator. The more probable reason for decreeing an account in that case seems to be, because it was the case of mines; and the Court always distinguishes between digging of mines and cutting of timber, because the digging of mines is a sort of trade; and there are many cases where this Court will relieve and decree an account of ore taken, when in any other tort or wrong done it has refused relief.[1] If this be the reason of the determination in that case, as I really think it is, it stands quite different from the present; I am therefore of opinion, upon this first head, that this bill brought by Jesus College, to have satisfaction for timber cut down after an assignment of the lease, when the proper remedy is at law, ought to be dismissed.[2]

1 A bill for an account of mining was maintained in the following cases: Bishop *v.* Knight, 1 P. Wms. 406; Story *v.* Windsor, 2 Atk. 630; Pulteney *v.* Warren, 6 Ves. 72, 89 (*semble*); Parrott *v.* Palmer, 3 M. & K. 632 (*semble*); Wright *v.* Pitt, 12 Eq. 408, 416 (*semble*).

2 Smith *v.* Cooke, 3 Atk. 378, 381 (*semble*); Pulteney *v.* Warren, 6 Ves. 72, 89 (*semble*); Universities *v.* Richardson, 6 Ves. 689, 705 (*semble*); Grierson *v.* Eyre, 9 Ves. 341, 346; Lansdowne *v.* Lansdowne, 1 Madd. 116, 138 (*semble*); Richards *v.* Noble, 3 Mer. 673; Parrott *v.* Palmer, 3 M. & K. 632; Gent *v.* Harrison, Johns. 517, 524 (*semble*); Higginbotham *v.* Hawkins, 7 Ch. 676; Dennett *v.* Dennett, 43 N. H. 499, 503; Lippincott *v.* Barton, 42 N. J. Eq. 272.

Account for equitable waste although no injunction. If, however, there is no remedy at common law for waste, a bill for an account will be supported although no relief by injunction is given. Whitfield *v.* Bewit, 2 P. Wms. 240; Garth *v.* Colton, 3 Atk. 751, 1 Ves. 524, 546, 1 Dick. 183 s. c.; Lansdowne *v.* Lansdowne, 1 Madd. 116; Ormonde *v.* Kynersley, 5 Madd. 369; Leeds *v.* Amherst, 2 Ph. 117; Lushington *v.* Boldero, 15 Beav. 1; Blake *v.* Peters, 1 D. J. & S. 345; Morris *v.* Morris, 3 De G. & J. 323 (*semble*); Gent *v.* Harrison, Johns. 517; Birch-Wolfe *v.* Birch, 9 Eq. 683; Honywood *v.* Honywood, 18 Eq. 306, 312 (*semble*); Baker *v.* Seabright, 13 Ch. D. 179. — Ed.

BRADY *v.* WALDRON.

Before James Kent, Esq., C., June 15, 1816.

[2 *Johnson, Chancery*, 148.]

The bill was filed by the plaintiff, a mortgagee, for an injunction to stay waste in cutting timber on the mortgaged premises, whereby the land would become an insufficient security for the debt. There was no suit pending for a foreclosure.

The Chancellor. An injunction lies against a mortgagor in possession to stay waste. The court will not suffer him to prejudice the security.[1] Dick. Rep. 75. 3 Atk. 210, 237. 3 Vesey, 105.

[1] Usborne *v.* Usborne, Dick. 75; Robinson *v.* Litton, 3 Atk. 209, 210; Farrant *v.* Lovel, 3 Atk. 723; Humphreys *v.* Harrison, 1 J. & W. 581; Hippesley *v.* Spencer, 5 Madd. 422 (*semble* — security not prejudiced); King *v.* Smith, 2 Hare, 239; Goodman *v.* Kine, 8 Beav. 379; Harper *v.* Aplin, 54 L. T. Rep. 383; Bagnall *v.* Villar, 12 Ch. D. 812 (injunction against cutting crops after possession demanded by mortgagee); Proudfoot *v.* Bush, 7 Grant, Ch. 518, 531; Coker *v.* Whitlock, 54 Ala. 180; Robinson *v.* Russell, 24 Cal. 467 (*semble* — security not prejudiced); Buckout *v.* Swift, 27 Cal. 433 (*semble* — removal of house not restrained because security not prejudiced); Lavenson *v.* Standard Co., 80 Cal. 245, 247; Cooper *v.* Davis, 15 Conn. 556; McKelvey *v.* Creevey, 72 Conn. 464, 470; Thompson *v.* Lynam, 1 Del. Ch. 64, 67; Pasco *v.* Gamble, 15 Fla. 562, 566; Nelson *v.* Pinegar, 30 Ill. 473; Matzon *v.* Griffin, 78 Ill. 477, 479; Dorr *v.* Dudderan, 88 Ill. 107, 108; Williams *v.* Chicago Co., 188 Ill. 19; Gray *v.* Baldwin, 8 Blackf. 164; Ellison *v.* Smyth, 75 Iowa, 570; Vanderslice *v.* Knapp, 20 Kan. 647, 649; Harris *v.* Bannon, 78 Ky. 568, 570; Murdock's Case, 2 Bland, 461; Salmon *v.* Clagett, 3 Bland, 125, 5 Gill & J. 314; Brown *v.* Stewart, 1 Md. Ch. 87; Parsons *v.* Hughes, 12 Md. 1; State *v.* Northern Co., 18 Md. 193; Thompson *v.* Heywood, 129 Mass. 401; Adams *v.* Corriston, 7 Minn. 456, 464; Capner *v.* Fleming Co., 3 N. J. Eq. 467; Emmons *v.* Hinderer, 24 N. J. Eq. 39; Chenango Bank *v.* Freese, 26 N. J. Eq. 452 (*semble*); Betz *v.* Verner, 46 N. J. Eq. 256, 268; Selden *v.* Mann, 2 N. Y. Leg. Obs. 328; Van Wyck *v.* Alliger, 6 Barb. 507, 511; Martin's Ap., (Pa. 1887) 9 Atl. R. 490; Bradley *v.* Reed, 2 Pittsb. 519; Waterman *v.* Matteson, 4 R. I. 539, 545; Scott *v.* Wharton, 2 Hen. & Munf. 25; Bunker *v.* Locke, 15 Wis. 635; Fairbank *v.* Cudworth, 33 Wis. 358; Scott *v.* Webster, 50 Wis. 53; Atkinson *v.* Hewitt, 51 Wis. 275 *Accord.*

In King *v.* Smith, 2 Hare, 239, 243, Wigram, V. C., said: "If the security is sufficient, the court will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber. There must be a special case made out before this court will interpose. The difficulty I feel is in discovering what is meant by a 'sufficient security.' Suppose the mortgage debt, with all the expenses, to be 1000*l.*, and the property to be worth 1000*l.*, that is, in one sense, a sufficient security; but no mortgagee who is well advised, would lend his money, unless the mortgaged property was worth one third more than the amount lent at the time of the mortgage. If the property consisted of houses, which are subject to many casualties to which land is not liable, the mortgagee would probably require more. It is rather a question of prudence than of actual value. I think the question which must be tried is, whether the property the mortgagee takes as a security is sufficient in this sense, — that the security is worth so much more than the money advanced, — that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into."

The doctrine of the principal case is not limited to mortgagor, in the strict sense of the term. The holder of security in any form may obtain an injunction against acts by the owner of the land, which will render the security insufficient, *e. g.*, —

Vendee in possession. — Crockford *v.* Alexander, *supra*, p. 221, to the note to which case *supra*, p. 222, may be added the following cases: Hughlett *v.* Harris, 1 Del. Ch. 349; Van Wyck *v.* Alliger, 6 Barb. 507; Bradley *v.* Reed, 2 Pittsb. 519; Kimball *v.* Darling, 32 W. T. 675; Taylor *v.* Collins, 51 Wis. 123.

Owner of a rent charge. — Lord Blaney *v.* Mahon, 2 Eq. Ab. 758, pl. 5; Thompson *v.* Lynam, 1 Del. Ch. 64, 67.

HAWLEY v. CLOWES.

Before James Kent, Esq., C., February 6, 1816.

[2 *Johnson, Chancery*, 122.]

The bill prayed for a partition of land, and for an injunction to stay waste in cutting down and carrying away the timber. It stated that the plaintiff and defendant owned the land as tenants in common, in equal undivided moieties, and that the defendant is in the actual possession of the whole by himself, or his tenant, and is cutting down the timber, and threatening to persevere; but admitted the plaintiff's title as tenant in common.

An injunction was granted on filing the bill, which was sworn to.

The Chancellor. The injunction must be modified so as to confine it to timber then standing and growing on the premises, and not wanted for the necessary use of the farm. The last cited case [1] ad-

Judgment creditor. — Hughlett v. Harris, 1 Del. Ch. 349; Jones v. Britton, 102 N. Ca. 166; Angier v. Agnes, 98 Pa. 587, 591.

Execution creditor. — Law v. Wilgees, 5 Biss. 13, 16; Webb v. Boyle, 63 N. Ca. 271.

Attaching creditor. — Camp v. Bates, 11 Conn. 51.

Surety for mortgagor. Knarr v. Conaway, 42 Ind. 260, 265; Johnson v. White, 11 Barb. 194.

No Injunction against Removal of Product of Wrongful Severance from Land by Mortgagor. — In England, and the States of this country, in which the courts have respected the language of the mortgage deed, the mortgagee, having the legal title to the mortgaged land, has the legal title also to timber and other chattels created by a wrongful severance from the land by the mortgagor, and therefore may maintain trover against him for their conversion. Anon, 1 Ves. Jr. 93; Hitchman v. Walton, 4 M. & W. 409; Holland v. Hodgson, L. R. 7 C. P. 328; *Re* Bruce, 9 Ben. 236; Dorr v. Dudderar, 88 Ill. 107; Gore v. Jenness, 19 Me. 53; Frothingham v. McCusick, 24 Me. 403; Whidden v. Seelye, 40 Me. 247; Mosher v. Vehue, 77 Me. 169; Searle v. Sawyer, 127 Mass. 491; Wilbur v. Moulton, 127 Mass. 509; Southbridge Bank v. Mason, 147 Mass. 500; Smith v. Moore, 11 N. H. 55; Howe v. Wadsworth, 59 N. H. 397; Hoskin v. Woodward, 45 Pa. 42; Gill v. Weston, 110 Pa. 317; Waterman v. Matteson, 4 R. I. 539.

But the owner of chattels in general, not being entitled to restrain their asportation or conversion, unless the threatening converter is insolvent, or the judgment for money, even if paid, would be an inadequate remedy (Watson v. Sutherland, *infra*, 531, 532, n. 3), a mortgagee cannot have an injunction in the case supposed, unless he can bring his case within one or the other of these two exceptions.

In those States in which the courts, sometimes with, but generally without, the aid of a statute, deny an action of trover to the mortgagee for the product of the mortgagor's wrongful severance from the land (Buckout v. Smith, 27 Cal. 433; Morsant v. McPhee, 92 Cal. 76; Cooper v. Davis, 15 Conn. 556; McKelvey v. Creevey, 72 Conn. 464; Vandershice v. Knapp, 20 Kas. 647; Tomlinson v. Thompson, 27 Kas. 70; Adams v. Corriston, 7 Minn. 456 (but see Hamlin v. Parsons, 12 Minn. 108); Kircher v. Shalk, 39 N. J. 335; Devlin v. Collier, 53 N. J. 422, 426; Peterson v. Clark, 15 Johns. 205; Selden v. Maun, 2 N. Y. Leg. Obs. 205; Wilson v. Maltby, 59 N. Y. 126), an injunction against the removal of the chattel thus created, is obviously out of the question. Chenango Bank v. Cox, 26 N. J. Eq. 452; Watson v. Hunter, 5 Johns. Ch. 169; People v. Alberty, 11 Wend. 160; Van Wyck v. Alliger, 6 Barb. 507.

Nor, in these States, should the mortgagee have an injunction, even though the mortgagor is insolvent. See, however, Chenango Bank v. Cox, *supra*; American Co. v. North Belleville Co., 31 N. J. Eq. 89 (injunction against removal of stone severed after filing of bill of foreclosure); Ensign v. Colburn, 11 Paige, 503; Johnson v. White, 11 Barb. 194, 197. — Ed.

[1] Smallman v. Onions, 3 Bro. C. C. 621.

mitted the authority of the court to grant the writ between tenants in common, in special cases, as where the defendant was sworn to be insolvent;[1] and Lord Eldon, in the subsequent cases of Hole *v.* Thomas,[2] and of Tworl *v.* Tworl,[3] admitted the propriety and necessity of this power in the court, between tenants in common, where the waste was destructive to the estate, and not within the usual and legitimate exercise of enjoyment. The case, therefore, of the exercise of this power must rest in sound discretion; it is not a case of a want of jurisdiction. Here is a bill for partition, and pending the suit it appears to be extremely fit that the tenant in common in possession should not be permitted to strip the land of its timber. It is destructive, in many cases, of the value of the estate, and not consistent with a prudent enjoyment by the real owner. The statute of W. 2, 13 Ed. I., c. 22 (sess. 10, ch. 6), gives an action of waste by one tenant in common against another. It is, therefore, an injury recognized by law, and the remedy by injunction is applicable to every species of waste, it being to prevent a known and certain injury; this remedy is peculiarly proper and appropriate pending a bill for partition of the very land. It comes within the equity of the statute (of sess. 10, ch. 50, s. 29), which prohibits a defendant, pending a suit for the land, from making waste, and directs the court, where the suit is pending, to prevent it. The injunction, therefore, under the above modification, must be continued until answer, and further order.[4]

Injunction continued.

[1] Smallman *v.* Onions, 3 Bro. C. C. 623; Stout *v.* Curry, 110 Ind. 514 *Accord.* — Ed.

[2] 7 Vesey, 589.

[3] 16 Vesey, 128.

[4] In the following cases the threatened waste by a tenant in common was of so serious a nature as to warrant an injunction at the suit of his co-tenant: Hole *v.* Thomas, 7 Ves. 589 (cutting saplings at the wrong time); Tworl *v.* Tworl, 16 Ves. 128 (*semble* — waste destructive to inheritance); Durham *v.* Wawn, 3 Beav. 119 (*semble* — same as preceding case); Arthur *v.* Lamb, 2 Dr. & Sm. 428 (*semble* — same as preceding case); Dougall *v.* Foster, 4 Grant, Ch. 319 (removing soil to considerable depth and selling it); Proudfoot *v.* Bush, 7 Grant, Ch. 518 (cutting timber, the sole value of the land); Musch *v.* Burkhart, 83 Iowa, 301 (cutting a boundary hedge giving shade and shelter); State *v.* Judge, 52 La. An. 103 (cutting timber — but Louisiana law differs from that of other states); Coffin *v.* Loper, 25 N. J. Eq. 443 (stripping land of timber); Weise *v.* Welsh, 30 N. J. Eq. 431 (working a mine); North Pa. Co. *v.* Snowden, 45 Pa. 488, 490 (*semble*); Bradley *v.* Reed, 2 Pittsb. 519 (destructive waste); Johnson *v.* Johnson, 2 Hill Ch. 277 (cutting timber); Woods *v.* Early, 95 Va. 307 (material alteration of building); Atkinson *v.* Hewitt, 51 Wis. 275, 281 (stripping land of timber).

In the following cases an injunction was denied: Smallman *v.* Onions, 3 Bro. C. C. 621 (*semble* — cutting timber); Arthur *v.* Lamb, 2 Dr. & Sm. 430 (cutting timber); Bailey *v.* Hobson, 5 Ch. 180 (selling hay and turnips from the land); Job *v.* Potton, 20 Eq. 84 (working coal mine fairly); Hihn *v.* Peck, 18 Cal. 640 (cutting timber); McCord *v.* Oakland Co., 64 Cal. 145 (working a mine, plaintiff not excluded); Blood *v.* Blood, 110 Mass. 547 (using chattels); Russell *v.* Merchants' Bank, 47 Minn. 286 (continuing a brick yard business begun by both co-tenants); Obert *v.* Obert, 5 N. J. Eq. 397 (cutting timber); Mott *v.* Underwood, 148 N. Y. 463, 470 (ordinary legal waste); Dodd *v.* Watson, 4 Jones Eq. 48 (temporary removal of fixtures from a disused mill).

It was said extrajudicially in Tworl *v.* Tworl, 16 Ves. 128, and Dougall *v.* Foster, 4 Grant Ch. 319, that a tenant in common would not be restrained from cutting ornamental timber. But these *dicta* can hardly represent the law. — Ed.

SECTION II.

TRESPASS.[1]

MOGG *v.* MOGG.

IN CHANCERY, BEFORE LORD THURLOW, C., MARCH 13, 1786.

[*Dickens*, 670.]

THE plaintiff was a trustee of certain estates, and in whom the legal estate was vested: the defendant hath not any right, but persuaded the tenants to cut down timber.

Bill for an injunction to stay waste; and this day the plaintiff moved for an injunction accordingly, upon filing the bill: it was mentioned on the 11th, but the Lord Chancellor desired Mr. Madocks to see if he could find an instance where a stranger comes upon lands as a trespasser and cuts down timber or commits waste in which this court hath granted an injunction to stay him, saying he was liable to an action by which he might be stayed.

On this day, the 13th, Mr. Madocks said he had recollected a case before Lord Camden, C., in which the plaintiff was lord of a manor in Oxfordshire, upon which the defendants claimed a right to estovers, and under that right they cut down timber in one day to the value of 400*l.*; the plaintiff filed his bill for an injunction to stay waste, and obtained one; upon its being served, their attorney advised the defendants to desist from cutting down any more timber, but advised other tenants of the manor to cut down timber; upon which Lord Camden granted an injunction to stay waste against persons not parties, and Mr. Madocks argued this as a case in point.

The Lord Chancellor said it did not apply, for in that case there was a right to something in the defendants, though perhaps they carried it beyond what such right went to; and that until such right was determined, it was very proper to stay them from doing an act which, if it turned out they had no right to do, would be irreparable; but in the present case the defendant had no interest; he was a mere

[1] In accordance with the common usage of equity lawyers, trespass in this section includes not only torts which would support an action of trespass by a plaintiff in possession, but also torts committed by a defendant in possession, but causing a similar damage to the property. — ED.

trespasser, and being such, an action of trespass would lie against him; and therefore his Lordship would not grant the motion.[1]

MORTIMER *v.* COTTRELL.

IN CHANCERY, BEFORE LORD THURLOW, C., DECEMBER 16, 1789.

[2 *Cox*, 205.]

THE defendant had for some time acted under a power from the plaintiff as the receiver of several rents of houses belonging to the plaintiff, and had also been authorized by the plaintiff to dig earth in an adjoining brick-field to a certain depth from the surface. The defendant having dug beyond the limit, the plaintiff revoked all powers of attorney made to the defendant, and required him to desist from digging any further; but the defendant continuing to dig, the plaintiff filed this bill, praying that the defendant might be restrained by injunction from digging further on the premises. And the Solicitor General now moved for an injunction on certificate of the bill filed and affidavit of the fact, and urged that as this ground was intended for building, and as it would be rendered unfit for the foundation of a house if the ground was dug deeper from the surface than the limited depth, this was one of that species of irreparable mischief which this court would prevent by injunction.

But the LORD CHANCELLOR said, the defendant was a mere stranger; that he had been guilty of a forcible entry, and that there was no case where this court would interfere by injunction, when the party was a mere stranger, and might be turned out of possession immediately.[2]

[1] In November of the same year, upon a motion for an injunction in the similar case of Hamilton *v.* Worsefold, Lord Thurlow "at first had some difficulty about granting it; Worsefold being a mere trespasser: but at length his Lordship granted the injunction against both Worsefold and the tenants." 10 Ves. 291, n. (88). — ED.

The earliest suggestion of an injunction against a trespass seems to be the following statement of Lord Hardwicke in Coulson *v.* White, (1743) 3 Atk. 21: "Every common trespass is not a foundation for an injunction in this court, where it is only contingent and temporary; but if it continues so long as to become a nuisance, in such a case the court will interfere and grant an injunction to restrain the person committing it."

[2] Stevens *v.* Beekman, (1814) 1 Johns. Ch. 318 *Accord.*

In this case Chancellor Kent said, p. 319: "This is a case of ordinary trespass upon land, and cutting down timber. The plaintiff is in possession, and has adequate and complete remedy at law. This is not a case of the usual application of jurisdiction by injunction; and if the precedent were once set, it would lead to a revolution in practice, for trespasses of this kind are daily and hourly occurring. I doubt, exceedingly, whether this extension of the ordinary jurisdiction of the court would be productive of public convenience. Such cases are generally of local cognizance; and drawing them into this court would be very expensive, and otherwise inconvenient." — ED.

PILLSWORTH *v.* HOPTON.

In Chancery, before Lord Eldon, C., May 6, 1801.

[6 *Vesey*, 51.]

Mr. Thomson, for the plaintiff, moved for an injunction to restrain the defendant from committing waste. The defendant was in possession; the tenants had attorned; and the plaintiff, having brought an ejectment, had failed in it; but, as the bill alleged, not upon the merits.

Lord Chancellor. I do not recollect that the court has ever granted an injunction against waste under any such circumstances: the defendant in possession; the tenants having attorned; the plaintiff having failed in his ejectment; both setting up pretences of title. I remember perfectly being told from the bench very early in my life that if the plaintiff filed a bill for an account, and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction.[1]

His Lordship having inquired if the bar knew any instance, and none being produced, would not make the order.

MITCHELL *v.* DORS.

In Chancery, before Lord Eldon, C., June 23, 1801.

[6 *Vesey*, 147.]

Mr. Mansfield and Mr. Bell moved for an injunction against the defendant; who having begun to get coal in his own ground had worked into that of the plaintiff.

Lord Chancellor. That is trespass, not waste. But I will grant the injunction upon the authority of a case before Lord Thurlow: a person, landlord of two closes, had let one to a tenant, who took coal out of that close, and also out of the other, which was not demised; and the difficulty was whether the injunction should go as to both; and it was ordered as to both.[2]

1 In Norway *v.* Rowe, 19 Ves. 144, 147, Lord Eldon said, in 1812: "The court has certainly proceeded to extend injunction to trespass; but I do not recollect it ever granted on that head, where the fact of the plaintiff's title to the property, on which waste was committed, was disputed by the answer." See also Powers *v.* Heery, R. M. Charlt. 523; Storm *v.* Mann, 4 Johns. Ch. 21.

2 "Lord Thurlow had great difficulty as to trespass. I have a note of a remarkable case, in which the name of one of the parties was Flamang. There was a demise of close A to a tenant for life; the lessor being landlord of an adjoining close, B. The tenant dug a mine in the former close. That was waste from the privity. But when we asked an injunction against his digging in the other close, though a continuation of the working in the former close, Lord Thurlow hesitated much; but did at last grant the injunction: first, from the irreparable ruin of the property as a mine; secondly, as it was a species of trade; and thirdly, upon the principle of the court enjoining in matter of trespass, where irreparable damage is the consequence." Per Lord Eldon in Hanson *v.* Gardiner, 7 Ves. 305, 308. — Ed.

SMITH *v.* COLLYER.

IN CHANCERY, BEFORE LORD ELDON, C., JANUARY 25, 1803.

[8 *Vesey*, 89.]

A MOTION was made to restrain the defendant from cutting timber.

The plaintiffs claimed under a general devise to them and their heirs of all and every the devisor's lands, &c., as well freehold as copyhold, and all other his real estates whatsoever and wheresoever. The estates were in mortgage; but the plaintiffs by their guardians were in receipt of the rents. The defendant put in an answer; claiming as nephew and heir at law; insisting that the will was not well executed.

THE LORD CHANCELLOR said this was quite a new case.

Mr. Cooke in support of the motion. The plaintiffs have no means of preventing or redressing this at law, the mortgagee having the legal title; and the mischief will be irremediable: no damages would be a compensation; and that is a ground for the jurisdiction, as was held in the Duke of Somerset *v.* Cookson and Pusey *v.* Pusey,[1] in which cases an action might have been brought. In this case they both claim under the same person, and the defendant is not in possession, as in Pillsworth *v.* Hopton.

THE LORD CHANCELLOR. I do not recollect any instance of this sort. The defendant denies that the plaintiffs are devisees. It is not waste but trespass upon their own showing. There was no instance of an injunction in trespass till the case before Lord Thurlow upon a mine, to which I have alluded,[2] which, though trespass, was very near waste. In that case, the first instance of granting an injunction in trespass, there was no dispute whatsoever about the right. Here the right is disputed. It was always surprising to me that the jurisdiction by injunction was taken so freely in waste, and not in trespass; for there is a writ at common law[3] after action to restrain waste. But a trespass after one action may be repeated. I remember, when, if a plaintiff stated that the defendant claimed by an adverse title, he stated himself out of court.[4]

1 1 Vern. 273.

2 Flamang's Case, *supra*, 488, n. 2.

3 Fitzherbert, Nat. Br. 139, Tit. Writ of Estrepement.

4 In Lowther *v.* Stamper, (1747) 3 Atk. 496, Lord Hardwicke denied a motion for injunction to restrain, until the hearing, the digging of mines, because the defendant denied plaintiff's title. But in Commissioners *v.* Blackett, (1848) 12 Jur. 151, Shadwell, V. C., under similar circumstances, granted a temporary injunction against working mines. — ED.

COURTHOPE *v.* MAPPLESDEN.

In Chancery, before Lord Eldon, C., December 19, 1804.

[10 *Vesey*, 290.]

A motion was made by a landlord for an injunction to restrain cutting and removing timber, and committing any other waste; the plaintiff charging collusion by the defendant with the tenant.[1]

The Lord Chancellor. I have no difficulty in granting the injunction in this case, but I will not be bound as to what is to be done upon a mere trespass, though it is strange that there cannot be an injunction in that case to prevent irreparable mischief: the rather, as there is a writ at common law to prevent the further commission of waste during the trial; whereas, if the court will not interfere against a trespasser, he may go on by repeated acts of damage, perfectly irreparable. But the ground in this case is that the trespass partakes of the nature of waste more than in general cases, the tenant colluding; and if the tenant's act is waste, the act of the other must have so much of the quality of the tenant's act as to make it the object of an injunction.

KINDER *v.* JONES.

In Chancery, before Sir W. Grant, M. R., Seals before Easter Term, 1810.

[17 *Vesey*, 110.]

The bill, filed by trustees, tenants, in fee-simple upon trust to sell, prayed an injunction to restrain the defendant from cutting down trees until the boundary of the estate could be ascertained at law.

Mr. Newland, for the plaintiffs, moved for an injunction under the following circumstances, stated by affidavit.

The estate consisted of a mansion-house, park, and other grounds. In a lane, adjoining the park on one side and grounds belonging to the estate on the other, were standing many timber trees alleged by the plaintiffs to be extremely ornamental to the mansion-house and park, and which trees were alleged by the plaintiffs to belong to them, the lane being a private lane, and belonging to the estate. But the defendant threatened to cut down those trees, claiming to be entitled to them, as standing on part of the waste of a manor, of which he was the lord.

The Lord Chancellor finding, on inquiry, that the defendant had not been served with notice of this motion, said that he must certainly be served with notice in such a case; and expressed some doubt

[1] The argument for the plaintiff is omitted. — Ed.

whether the court had ever granted an injunction in the case of trespass, where the title was disputed.

Notice of the motion having been accordingly served on the defendant, the motion was renewed before the Master of the Rolls, sitting for the Lord Chancellor; and the defendant not appearing, the injunction was granted.

THOMAS *v.* OAKLEY.

In Chancery, before Lord Eldon, C., August 12, 1811.

[18 *Vesey*, 184.]

The case, stated by this bill, was, that the plaintiff was seised in fee-simple of an estate, in which there was a stone quarry; and the defendant, having a contiguous estate, with a right to enter the plaintiff's quarry, and take stone for building and other purposes, confined to a part of his estate called Newton Farm, had taken stone to a considerable amount for the purpose of using it upon the other parts of his estate; praying an injunction and account.

To this bill the defendant demurred.[1]

The Lord Chancellor. The case has this specialty: the bill admits the defendant's right of entry into this quarry, and of taking stones for all the purposes of Newton Farm; though, if he takes for any other purpose, undoubtedly an action would lie; but is there any distinction between this case and that of a coal mine? Is not this taking away the very substance of the estate just as much as in the case of a coal mine? After the decisions, that have taken place, this demurrer cannot be maintained. The plaintiff represents himself to be seised as tenant in fee of an estate, in which there is a stone-quarry, that is parcel of the estate. He then states, which upon this occasion I must take to be true, that the defendant, having an estate in his neighborhood, consisting of Newton Farm, among other lands, as owner of that farm has a right to enter into the quarry for the purpose of taking stone, as far as he has occasion for building and other purposes upon that farm; but the plaintiff represents that the defendant has taken stone for the purpose of application, not upon Newton Farm only, but also upon his other estates, and to a very considerable amount. That is trespass beyond all doubt, and not waste; as there is no such privity between the parties as would make it waste. His entry for the purpose of taking stone with reference to Newton Farm is lawful; but, if under color of that right he takes stone for the enjoyment, not of his farm only, but his other estates, his entry to that extent is unlawful, and his act a trespass; and, if it is settled that the court will interfere by way of injunction and account, this demurrer cannot prevail.

[1] The arguments of counsel are omitted. — Ed.

The distinction long ago established was, that if a person, still living, committed a trespass by cutting timber, or taking lead ore, or coal, this court would not interfere, but gave the discovery, and then an action might be brought for the value discovered; but, the trespass dying with the person, if he died, the court said, this being property, there must be an account of the value, though the law gave no remedy. In that instance, therefore, the account was given, where an injunction was not wanted. Throughout Lord Hardwicke's time, and down to that of Lord Thurlow, the distinction between waste and trespass was acknowledged; and I have frequently alluded to the case, upon which Lord Thurlow first hesitated, — a person, having a close demised to him, began to get coal there; but continued to work under the contiguous close, belonging to another person; and it was held that the former, as waste, would be restrained; but as to the close which was not demised to him, it was a mere trespass, and the court did not interfere; but I take it that Lord Thurlow changed his opinion upon that, holding that, if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which in equity he was entitled. The interference of the court is to prevent your removing that which is his estate. Upon that principle Lord Thurlow granted the injunction as to both. That has since been repeatedly followed; and whether it was trespass under the color of another's right actually existing, or not.

If this protection would be granted in the case of timber, coals, or lead ore, why is it not equally to be applied to a quarry? The comparative value cannot be considered. The present established course is to sustain a bill for the purpose of injunction, connecting it with the account in both cases; and not to put the plaintiff to come here for an injunction, and to go to law for damages.

The demurrer was overruled.[1]

DEERE *v.* GUEST.

In Chancery, before Lord Cottenham, C., August 6, 1836.

[1 *Mylne and Craig*, 516.]

The plaintiff, mortgagee of a farm in the parish of Merthyr Tidvil, took possession of the same in 1826 and demised it subsequently to one Henry, a yearly tenant. This farm was situate between the iron works of the defendant, the Dowlais Iron Co., and the Castle Limestone Quarries, which also were in the possession of the defendant. In 1833 the Dowlais Co., wishing to convey limestone from the Castle Quarries to their iron works, and by the shortest route, by falsely representing to Henry that the plaintiff's consent had been obtained,

[1] Cowper *v.* Baker, 17 Ves. 128; Grey *v.* Northumberland, 17 Ves. 281, 13 Ves. 236 *Accord.* — Ed.

induced Henry to permit the construction of a tram-road across the farm. In building the tram-road the defendant cut up and destroyed portions of two meadows on the farm to the extent of half an acre, made divers mounds and cuttings, broke down fences, put iron rails resting on stone blocks upon the road, and obstructed an ancient highway. The road was completed in September, 1833, and has been in continual operation since that time. In March, 1836, Henry ceasing to be tenant, the plaintiff, who resided one hundred miles from Merthyr Tidvil, discovered, with surprise, the existence of the tram-road and at once brought an action of trespass against the defendant. In April following he sought to remove the rails, but his workmen were driven off by the defendant. One Morgan, as tenant of the plaintiff, was in possession of the farm, except that part covered by the tram-road.

The bill prayed that the defendant might be restrained from using the tram-road, and might be decreed to restore the farm and lands and the ancient highway to the state in which the same were before the construction of the tram-road.

The plaintiff appealed from the decision of the Vice-Chancellor, who allowed the defendant's demurrer to the bill.[1]

The Lord Chancellor. The allegation upon this bill is that the tram-road complained of was made by the defendants across the farm of the plaintiffs by the license of the occupying tenant, and that the possession of that which now constitutes the road was at the time vested in the tenant and not in the landlord. Even now it is nowhere distinctly alleged that the plaintiff is at present in possession; for the allegation in the former part of the bill coupled with the passage in which the plaintiffs state that Morgan is the occupying tenant of the lands with the exception of the tram-road, the right of which the plaintiff has reserved to himself, amounts simply to this, that a former tenant having improperly given leave to the defendants to occupy a part of the land for the purposes of their road, the plaintiffs have restricted the possession of the new tenant to the part which is not so occupied.

But, however that may be, the thing here complained of has been done; the tram-road has, with the leave of the tenant in possession, been completed, and the court is asked, by the bill, to restrain the defendants, who, having finished the undertaking, are now in the daily use and occupation of it, from continuing so to use it, and from interrupting the servants and workmen of the plaintiffs, in their attempt to destroy it; in other words, the court is virtually asked to eject the defendants, and authorize the plaintiffs themselves to take possession of the tram-road. The case originally may have been a case of waste, — waste occasioned by the cutting of the tram-road and the laying of the iron rails over the plaintiff's land; but what is now claimed by the defendants is simply a right of way; and if they are not entitled to that right, they are mere trespassers, and the

1 The statement of the case has been summarized, and the arguments are omitted. — Ed.

plaintiffs have their proper legal remedy against them as such. The *dicta* of Lord Eldon in Norway *v.* Rowe[1] have no application to a state of circumstances like the present. The case there referred to by his Lordship was a case of waste committed by a stranger colluding with the tenant; a case in which the landlord would have had a right against the tenant, and, therefore, against a person who claimed through the tenant.

The appeal must therefore be dismissed.[2]

HAIGH AND ANOTHER *v.* R. JAGGAR AND OTHERS.

IN CHANCERY, BEFORE SIR J. L. KNIGHT BRUCE, V. C., AUGUST 4, 1845.

[2 *Collyer*, 231.]

THIS was a motion that the defendants, the Jaggars, their bailiffs, servants, agents, and workmen, might be restrained by injunction from further breaking into and entering upon the lower bed of coal demised to the plaintiffs, and from digging, raising, and taking coals therefrom, and from otherwise interfering with the rights, liberties, and privileges of the plaintiffs under the lease granted to them.

The defendants, the Jaggars, claimed to be lessees of some lands adjoining the plaintiffs' close, and of the said lower bed of coal.[3]

THE VICE-CHANCELLOR. Whether the law of the country, in its actual condition, provides for the protection of property in litigation, pending that litigation, as completely or effectually as in the present state and habits of society is sufficient for general convenience — whether, since the extensive changes which, within the last few years, the legislature has introduced, the writ of estrepement (as to which Fitzherbert, Brooke, and Coke furnish or refer to all, or almost all, the useful learning) is a remedy that remains in existence or can be obtained, — whether with reference to a dispute or an action, such as that existing between the present parties, that or any such writ ever could have issued, it is not necessary for me to intimate any opinion. But I am not aware of any authority that would support me in saying that the Court of Chancery, as a court of equity, has jurisdiction to interfere for the purpose of giving relief or protection in all cases such as those, or analogous to those, or within the same reason and principle as those, in which the writ of estrepement lies or did lie. I am not, however, convinced that, where a man is in possession, however full and complete, of an estate by a title simply and merely adverse to that of another by whom the estate is, whether at law or

[1] 19 Ves. 154.

[2] Water Lot Co. *v.* Bucks, 5 Ga. 315 *Accord.* — ED.

[3] The rest of the statement of the case, the arguments of counsel, and a portion of the judgment are omitted. — ED.

in equity, claimed against him, without any privity between them, such a state of things, if the party in possession, by his answer, whether truly or untruly, swears his title to be just and valid, or that of his adversary to be unjust and invalid, does of necessity prevent a court of equity from interfering (before any judgment at law or decree in equity) to restrain the party in possession from stripping the estate of its timber, pulling down the mansion-house upon it, or other such acts. It is, I think, certainly true that the Court of Chancery does not treat questions of destructive damage to property now exactly as it did forty or fifty years back — that its protection in such respects is more largely afforded than it then generally was. In saying which, I do not merely allude to the various injunctions against railway companies that have of late years been so frequent. Perhaps one of the most remarkable cases is Smith *v.* Collyer. That was before no less a person than Lord Eldon; yet I am not perfectly satisfied that, in the same circumstances (as far as they are to be collected from the report) this court would not now grant an injunction. The plaintiffs seem there to have been in possession substantially, and infants. In the case of Jones *v.* Jones,[1] before Sir W. Grant (whose language at p. 173 of the report is well worthy of observation), the plaintiff was out of possession, and there does not appear to have been a distinct allegation of the commission or threat of any waste or destruction. Such a case as Mortimer *v.* Cottrell would, I venture to think, probably not receive at the present day the decision which it received in 1789. In Pillsworth *v.* Hopton, which occurred in 1801, the plaintiff had failed in an ejectment. In Mitchell *v.* Dors, in the same year, the injunction was granted. Courthope *v.* Mapplesden was in 1804. Grey *v.* Duke of Northumberland[2] in 1809, Thomas *v.* Oakley in 1811, Norway *v.* Rowe[3] in 1812, Field *v.* Beaumont[4] in 1818, Parrott *v.* Palmer[5] in 1834.

In the present case both parties claim in effect under the same lessor or grantor; for the lease or grant under which the defendants claim was made by one Sykes in 1804. Sykes is dead, and the grant or lease to the plaintiffs was made in 1842 by the grandson or grandsons of Sykes, claiming under Sykes and by his title.

The question between the parties is whether the lease or grant of 1804 has expired or been abandoned, so as to be incapable of being now set up; the plaintiffs alleging the affirmative, the defendants the negative, of this proposition.

The defendants, who claim a right to do what they are doing, are, it is true, by working the coal, taking away the very substance of the property, which may in a sense be perhaps called in this case, and might in others most certainly be, waste or destruction; but, on the other hand, it is the only mode in which the property in question can be usefully enjoyed or made available, and may, therefore, in a sense perhaps be deemed not more than taking the ordinary usufruct of the

[1] 1 Mer. 173. [2] 17 Ves. 281. [3] 19 Ves. 144.
[4] 1 Swanst. 204. [5] 3 Myl. & K. 632.

thing in dispute; nor is unskilful or unminerlike working established against the defendants to my satisfaction, nor are they said to be insolvent.

On the whole, whatever my impression may be as to the validity or invalidity of their title, and whatever I might have deemed it right to do in the absence of precedent and authority, I doubt too much of my ability to act now against the defendants on this motion, consistently with precedent and authority, to render it in my opinion fit that I should do so; especially as the defendants have been working the coal in question ever since August, 1844. The bill was filed not before 26th July, 1845. An action was commenced by the plaintiffs in February last, and discontinued; and I am not satisfied that they might not have brought their pending action to trial at these assizes if so disposed; which circumstances are not by any means matters to be disregarded in a case or for a purpose such as the present.[1] The Lord Chancellor can be applied to.

I have said nothing as to amending the bill and notice of motion by asking a receiver or manager because I have not a strong impression that I could accede even to that application in the present position of the action and question between the parties.

DAVENPORT *v.* DAVENPORT.

IN CHANCERY, BEFORE SIR JAMES WIGRAM, V. C., MARCH 3, 1849.

[7 *Hare*, 217.]

THE bill stated that the plaintiff became entitled upon the death of one William Davenport, in April, 1829, to certain estates in the county of Chester; that the defendant's husband by virtue of some pretended title unknown to the plaintiff, entered into possession of the estates and continued in possession until his death in 1845; that the defendant then entered and is now in possession under some pretended title; that the plaintiff was not aware of his right in these estates until recently, and that upon discovering them he demanded possession, but without success; and that on January 10, 1849, which was as soon as his circumstances would allow, he began an action of ejectment against the defendant which stood for trial at the next Chester Assizes.

The bill further alleged that the defendant threatened to cut down the timber and other trees upon the said lands and to sell the same, that such timber and trees were of the value of 2000*l.* and upwards and very ornamental, and prayed for an injunction to restrain the defendant from cutting down any of the said timber or trees, and for an account.

[1] See on this point of laches, Field *v.* Beaumont, 1 Sw. 204, 208; Jones *v.* Jones, 3 Mer. 161, 173, 174; Real Co. *v.* Pond Co., 23 Cal. 82; Higgins *v.* Woodward, Hopk. 342. — ED.

The defendant demurred.[1]

Vice-Chancellor. If this question were new, I should have no hesitation in holding that, upon the facts stated upon the bill, the plaintiff would be entitled to the injunction. In the absence of authority my mind, in cases of actual destruction of property, would be little prepared to admit the distinction between waste and trespass in cases like the present. But the question is whether the cases of trespass against a party in possession are not cases of a class in which the court refuses to act until the right is established at law.

The jurisdiction of the court in cases of injunction, originally, no doubt, arose in cases of waste, where there was privity between the parties. All the earlier cases are of that description. The court began afterwards to interfere in cases of trespass; but I believe it will be found that the cases in which the jurisdiction was exercised in restraining trespass have been cases of this peculiar description, — the party complaining has been in possession of property, and has complained that his possession was wrongfully invaded by some alleged trespasser. The alleged trespasser, on the other hand, has not admitted the possession of the plaintiff, nor claimed a right to invade such possession as he had, nor intended to do so, — as in the case of the underground workings of adjoining mines, — and the court has distinguished these cases from ordinary cases of trespass by saying the alleged wrong-doer claimed under color of title. The cases of railway companies taking lands under the compulsory powers given them by Parliament are of the same class. Neither party disputes the abstract right of the other to that which he claims. The dispute is as to the practical application of the law to the facts of the case. It has always appeared to me the court was trying to get out of a technical rule, with a view to the better protection of property.

I remember a case concerning the property of Lady Bastard, in the west of England, in which some observations on this point were made by the Lord Chancellor in the course of the argument. Persons working mines insisted that, within a particular district, there was a right common to all miners to make drifts through private closes, for the purpose of draining the mines. This right they were about to assert by cutting a trench through some property of Lady Bastard. In that case the Lord Chancellor granted the injunction. But whether these are or are not refinements as to the claim being made under a color of right, I think no case can be found in which — the party out of possession coming to this court, complaining that another party in possession, and insisting upon a title to that possession, is cutting down timber or doing any other act of destruction — the court has ever granted an injunction until the right has been established at law.

[1] The statement of the case is summarized and the arguments of counsel are omitted. — Ed.

The present case, however, would not be determined if the case rested there; for the bill states, and the demurrer therefore admits, that the plaintiff is the party entitled, and that the defendant, having been in possession for nearly twenty years, claims under a pretended title. I do not, however, understand that the bill asserts that the defendant does not claim a right to the possession. Whether the defendant may or may not be eventually successful in defending the possession, I should have thought that, if such a case could exist, this ought to be one for granting an injunction, inasmuch as there is, for the present purpose, an admission upon the record that the title, whatever the result of the trial may be, is in some sense a pretended title. But I have the case of Jones *v.* Jones[1] before me, where the question arose upon demurrer, and my difficulty is that I cannot, in the face of that decision of Sir William Grant, take upon myself to say that I am not to apply the rule there laid down to this demurrer. I quite agree with Sir William Grant's observations and with those of the Vice-Chancellor Knight Bruce. I cannot, however, do otherwise than say that if the cases are to be overruled, it must be by the Lord Chancellor.

In the case before Sir William Grant, the plaintiff alleged that the testator died intestate, — that the plaintiff was his heir-at-law, and as such had become entitled to the estate, and that certain other persons had some paper, which they called a will, not attested so as to pass the real estate. Sir William Grant said, the court never had done what was there asked; but he adds that, at least, the party ought to state that he had used due diligence, whereas it appeared that he had two years. How long the plaintiff in this case has waited I do not know. He says he had not discovered his title until very recently. What "very recently" may mean, as against a party who has been in possession for nearly twenty years, I do not know.

I cannot help expressing my surprise that the law should be in this state, but I am compelled to allow the demurrer. I must refer the plaintiff to a higher tribunal, if he thinks he can sustain the bill.[2]

NEALE *v.* CRIPPS.

IN CHANCERY, BEFORE SIR W. P. WOOD, V. C., JUNE 12, 1858.

[4 *Kay and Johnson*, 472.]

THE plaintiff claimed to be entitled to a certain farm and land in Haresfield in the county of Gloucester, as heir in tail of the third and the defendants claimed through the fourth son of Charles Neale, who died in 1856.

[1] 3 Mer. 161.

[2] Webster *v.* S. E. Co., 1 Sim. N. S. 272; Talbot *v.* Scott, 4 K. & J. 577; Sandys *v.* Murray, 1 Ir. Eq. R. 29 *Accord.* — ED.

On the 26th of April, 1858, the plaintiff began an action of ejectment against one Harris, who, on the death of Charles Neale, had attorned tenant to the defendants.

The bill prayed that the defendants might be restrained from cutting down any timber standing on the estate and from removing any timber already cut, and for an account.

By an affidavit filed on behalf of the plaintiff, it was deposed as follows: "The said defendants have lately caused the timber and timber-like trees on the said estate to be cut down, and, to a considerable extent, since the said action of ejectment has been commenced, and they are proceeding to cause the remainder of the trees on the said estate which are of any value to be cut down; and the said defendants or their said solicitors have cut down the timber standing on the said estate in such manner and to such extent as nearly to strip the land of all trees and timber-like trees thereon of any value; and I believe that the said defendants have cut down the said timber, and are proceeding to cut down the remainder thereof, for the express purpose of wasting the value of the property of the plaintiff in the said estate, and with intent to defraud the plaintiff of his just right in the said estate; for the way in which the said timber is cut is so destructive that it cannot be referred to any fair act of ownership."

Mr. Langworthy now moved *ex parte*, for an injunction, as prayed by the bill.

The Vice Chancellor, after reading the extract from the affidavit, granted an interim injunction until the 14th of June, in terms of the prayer of the bill; with leave to serve notice of motion for the 12th: the plaintiff undertaking to be answerable for damages.

The Vice-Chancellor. I remember the acts of waste deposed to in the affidavit. As notice of motion has been served, and the defendants have not appeared, you are entitled to an injunction until the hearing or until further order.

Ordered accordingly.[1]

LOWNDES *v.* BETTLE.

Before Sir R. T. Kindersley, V. C., January 23, 1814.

[*3 New Reports*, 409.[2]]

A testator in 1768 devised his estate to his heir-at-law, but if no heir-at-law could be found, he declared that William Lowndes should be his heir. The testator died in 1772; and in 1773 William Lowndes filed a bill to have his right so ascertained. No heir-at-law could be found, and in 1783 a decree was made establishing the will, and declaring that the estate was to be considered as belonging to William

1 Talbot *v.* Scott, 4 K. & J. 96, 133 (*semble*) *Accord.* — Ed.

2 33 L. J. Ch. 451, 10 Jur. N. S. 226 S. C. — Ed.

Lowndes, and that he be put in possession. The estate has continued in this family ever since, and the plaintiff was one of his descendants, and the present owner. The defendant claimed to be heir-at-law of the testator, and in September, 1861, and since, had sent notices to the plaintiff threatening to come on the estate, and to cut trees and turf, in order, as he said, to keep up his rights, and to bar the Statute of Limitations.

On a motion for an interim injunction the defendant did not appear, and the injunction was granted; the case now came on to have the injunction made perpetual.

KINDERSLEY, V. C., said that from Lord Thurlow's time to the present a continual change had been taking place in the course of the court with regard to injunctions to restrain spoliation. There had been formerly a wide distinction between waste, or spoliation, by one having privity of title, and trespass or spoliation by one claiming adversely, or making no claim whatever. This distinction had been much lessened, but still existed. There was also a distinction as to whether the court was supporting possession or interfering with it. The cases might be conveniently arranged under two heads: namely, where the plaintiff out of possession sought to restrain the defendant in possession; and where the plaintiff in possession sought to restrain the defendant out of possession. Cases under the first head might again be divided into cases where the plaintiff claimed privity of title, and cases where the plaintiff claimed adversely. Cases under the second head might also be divided into cases in which the defendant claimed no title, and cases where the defendant did claim title.

First. Where the plaintiff being out of possession sought to restrain the defendant in possession, and claimed privity of title. This was waste, and in such cases the courts never had any difficulty in granting injunctions.

Secondly. Where the plaintiff being out of possession sought to restrain the defendant in possession, and claimed adversely. The earliest case was Hamilton *v.* Worsefold,[1] before Lord Thurlow, in 1786, in which an injunction was granted, but this case could not be relied on, as it was doubtful whether there was no collusion with the tenants, and therefore waste properly so called. In Pillsworth *v.* Hopton, Lord Eldon refused an injunction, but in Crockford *v.* Alexander, in 1808, while granting an injunction under the peculiar circumstances of the case, he drew a distinction between trespass and waste. In Jones *v.* Jones,[2] in 1817, Sir William Grant said that he did not see any very good reason why the court should not protect real estate pending a suit, but nevertheless refused an injunction partly on the ground of delay. In Haigh *v.* Jaggar, in 1845, Sir J. L. Knight Bruce said that he was not convinced that the court could not restrain the party in possession from stripping the estate of its timber, pulling down the manor house, &c., for this court did not treat questions of destructive damage to property then exactly as it did forty

[1] 10 Ves. 290 n. (88).

[2] 3 Mer. 161.

or fifty years before. The injunction, however, was refused partly on the ground of delay. In Davenport *v.* Davenport,[1] in 1849, Sir James Wigram allowed a demurrer, for want of equity, to a bill praying an injunction, and stated that the cases in which the jurisdiction was exercised in restraining trespass were cases of peculiar description, and that the court was always trying to get out of a technical rule. He, however, expressed his surprise that the law should be in that state. And finally Sir W. P. Wood, in Neale *v.* Cripps, in 1858, granted an injunction to restrain the defendants in possession from stripping an estate of timber, upon a motion by a plaintiff claiming under a title at law. His honor also referred to Earl of Fingal *v.* Blake[2] and Lloyd *v.* Lord Trimleston.[3]

Thirdly. Where the plaintiff in possession sought to restrain the defendant out of possession, the defendant claiming no title. In Mogg *v.* Mogg, in 1789, and Mortimer *v.* Cottrell, an injunction was refused; but in Mitchell *v.* Dors, in 1801, Lord Eldon granted an injunction to restrain the owner of an adjoining coal mine from working into the plaintiff's land; and in Courthope *v.* Mapplesden, Lord Eldon granted an injunction to restrain cutting timber; but here there was collusion with a tenant, and the decision was without prejudice to the case of a mere trespass. However, in Cowper *v.* Baker,[4] in 1810, the same judge granted an injunction to restrain a mere trespasser from committing what the court considered to be irremediable mischief.

Fourthly. Where the plaintiff in possession sought to restrain the defendant out of possession, the defendant claiming title. This was the case here. The earliest case was one before Lord Camden, cited in Mogg *v.* Mogg, in which an injunction was granted to restrain tenants of a manor from cutting trees. In Robinson *v.* Lord Byron,[5] in 1785, an injunction was granted to restrain the owner of a higher part of a stream from interfering with the water flowing to the plaintiff's mill. The only case in which an injunction of this kind had been refused, when the damage was "irreparable," was Smith *v.* Collyer, in 1803, before Lord Eldon; but Sir J. L. Knight Bruce, referring to this case in Haigh *v.* Jaggar, said he was not satisfied that the court would not now grant such an injunction. Lord Eldon granted an injunction in Gray *v.* Duke of Northumberland,[6] in 1806, to restrain the lord of a manor from cutting trees.

The result of the case seemed to be this: Where a plaintiff out of possession, not having privity of title with the defendant, sought to restrain the defendant from acts of spoliation, the court would only grant an injunction where the acts were of a flagrant kind causing great damage to the property. Again, where the plaintiff in possession sought to restrain one who claimed no title, the leaning of the court was to refuse the injunction, and to leave the plaintiff to his remedy at law. But where the plaintiff in possession sought to restrain one

[1] 7 Hare, 217.
[2] 2 Moll. 50.
[3] 2 Moll. 81.
[4] 17 Ves. 128.
[5] 1 Bro. C. C. 588.
[6] 13 Ves. 236, 17 Ves. 281.

who claimed title, the leaning of the court was to grant the injunction when the spoliation was irremediable, that is, when there was a destruction of part of the inheritance.

In the present case the defendant claimed as heir-at-law of the testator, and the acts threatened, viz., cutting trees and turf, were of the kind termed irremediable, and therefore the injunction, so far as it restrained the defendant from cutting trees and turf, must be made perpetual.[1]

GOODSON *v.* RICHARDSON.

In the Court of Appeal, January 19, 1874.

[*Law Reports*, 9 *Chancery Appeals*, 221.]

S. Goodson, the plaintiff in this case, was owner in fee of an undivided moiety of lands in the Isle of Thanet, abutting upon the highway from Broadstairs to Ramsgate, and as such was owner in fee of an undivided moiety of the adjoining half of the highway. He was also shareholder in a waterworks company at Ramsgate. The defendant, R. Richardson, owned some houses at Ramsgate, and being dissatisfied with the waterworks company, proceeded to construct waterworks for the supply of his houses. He applied to the highway board of the Isle of Thanet for permission to lay down pipes along the highway, which, after some time and discussion and opposition from the waterworks company, was, on the 8th of April, 1873, granted to him; the clerk to the board at the same time informing him that the board could only give permission subject to the rights of the owners of the lands. The defendant had on the 4th of April begun to lay the pipes along the highway, and (apparently in the course of the day of the 9th of April) he laid the pipes in the soil of the side of the road adjoining the land of which the plaintiff had an undivided moiety. On the same 9th of April the plaintiff and other landowners served the defendant with notice not to lay pipes in their lands, and that they intended to apply for an injunction. There was a dispute as to the exact times when the pipes were laid, and when the notice was received.

On the 21st of April the bill in this suit was filed, praying for a perpetual injunction to restrain the defendant from so laying any pipes and from allowing them to remain. The Master of the Rolls,

[1] Stanford *v.* Hurlstone, 9 Ch. 116 *Accord*.

In this case Lord Selborne, C., said, p. 119: "Some of the cases do not appear very reasonable, but in modern times the cases in which an injunction against waste has been refused have been cases where a plaintiff out of possession asked for an injunction against a defendant in possession. We need not consider whether in all these cases the court exercised a sound discretion, if the matter is one of discretion. It is enough to say that in Lowndes *v.* Bettle a very learned and careful judge held that, in circumstances closely resembling those of the present case, an injunction could be granted, and we have much satisfaction in following his decision." — Ed.

Sir G. Jessel, made a decree for a perpetual injunction, and the defendant appealed.[1]

Sir W. M. James, L. J. I am of the same opinion. The defendant in this case is admittedly a trespasser. He has committed a trespass upon the plaintiff's land without any legal justification or any legal excuse whatever; and he proposes to continue that trespass from day to day, keeping the pipes and allowing the water to go through them for the purpose of making a profit of a trade which he proposes to set up in rivalry to a trade which the owner of the land upon which he is so committing the trespass is interested in. It is said that we ought to allow this to be done, that we ought, in fact, to dismiss the plaintiff from this court, and tell him to find his way to another court, in which he is to bring an action for the wrong for which there is no defence whatever. He is to bring that action at his own cost, and having succeeded in one action, he is to bring a second, — I do not know whether more than one will be required, — and then, having succeeded in one action, or two actions, or perhaps three actions, all of which, on the facts proved in this case, would necessarily result in verdicts for him, he is to come back to this court and obtain a perpetual injunction on the ground of repeated vexation and repeated actions.

I do not think that there is any principle in this court which will compel us to drive the plaintiff to go through all that litigation before he is entitled to that relief which he would ultimately get when he had gone through it.

It is said that something of the kind was done in Deere *v.* Guest. In that case, beyond all question, the *ratio decidendi* (and that is always to be looked at when you are referring to an authority or decision) of Lord Cottenham (who affirmed the decision of the Vice-Chancellor) was that the defendant was a person in possession, and that the bill was a bill in substance brought to turn him out of possession, and to give the possession to the plaintiff, which would be strictly and simply an ejectment bill, and such a bill is not according to the practice of this court. Here there is nothing like a possession by the defendant. The plaintiff has been in possession, and is in possession, and the defendant has been a wrong-doer, and a mere trespasser who proposes to continue so.

The question is whether, under those circumstances, the plaintiff has not a right to come here, and so to put an end to that continuous trespass which the defendant has begun and intends to continue, there being no wrong whatever that can be suggested to the defendant. What is alleged on his behalf here is that if we grant the injunction we shall deprive him of a very valuable property, because it is essential to the value of his property that he should keep the plaintiff's property, which has been taken against his consent. Even if the defendant did originally unconsciously take that which was not his, yet

[1] The arguments of counsel and the concurring judgments of Lord Selborne, C., and Mellish, L. J., are omitted. — Ed.

he very soon became conscious that it was not his, and that he was taking that which was not his for the purpose of a profit to himself, against the will of the real owner. That is taking another man's property improperly, both morally as well as legally. I am of opinion that the decision of the Master of the Rolls is quite right, and that the injunction ought to be sustained.

The appeal must be dismissed with costs.[1]

COOPER *v.* CRABTREE.

Court of Appeal, March 17, 1882.

[*Law Reports*, 20 *Chancery Division*, 589.]

The plaintiff was the owner in fee of a cottage which adjoined on the north a piece of land belonging to the defendant. The plaintiff's cottage had a window overlooking the defendant's land, and in order to prevent the plaintiff from acquiring a prescriptive right to light, the defendant set up a hoarding on poles in order to block up the light coming to the window. The plaintiff alleged that a strip of land 1 ft. 9 in. in breadth between the cottage and the defendant's land belonged to him, and that the poles supporting the hoarding were placed on this strip of land. The cottage was not in possession of the plaintiff, but was let to weekly tenants. The plaintiff in his statement of claim alleged that the poles were on his land, that the erection was a nuisance to him and his tenants by rattling and creaking, and if continued would oblige the tenants to leave the cottage; and he claimed an injunction to restrain the defendant from allowing the poles and hoarding to remain on his land, and in any event to restrain the defendant from allowing them to remain so as to be a nuisance to the plaintiff or his tenants, and damages for the trespass and nuisance. The tenant was not made a party to the action.

1 "It is said that the objection of the plaintiff to the laying of these pipes in his land is an unneighborly thing, and that his right is one of little or no value, and one which Parliament, if it were to deal with the question, might possibly disregard. What Parliament might do, if it were to deal with the question, is, I apprehend, not a matter for our consideration now, as Parliament has not dealt with the question. Parliament is, no doubt, at liberty to take a higher view upon a balance struck between private rights and public interests than this court can take. But with respect to the suggested absence of value of the land in its present situation, it is enough to say that the very fact that no interference of this kind can lawfully take place without his consent, and without a bargain with him, gives his interest in this land, even in a pecuniary point of view, precisely the value which that power of veto upon its use creates, when such use is to any other person desirable and an object sought to be obtained." Per Lord Selborne, C., s. c. 223–224.

In accordance with the decision in Goodson *v.* Richardson, injunctions were granted in the following cases against trespassers without claim of right: Bowser *v.* McLean, 2 D. F. & J. 415 (using underground tramway); Hopkins *v.* Caddick, 18 Law Times, 236 (mining); Allen *v.* Martin, 20 Eq. 462 (entry upon garden); Smith *v.* Brown, 48 L. J. Ch. 694 (selling goods on plaintiff's land); Whitham *v.* Westminster Co., 1896, 2 Ch. 538, 1896, 1 Ch. 894 (tipping colliery spoil upon plaintiff's land); Campbell Davys *v.* Lloyd, 1901, 2 Ch. 518 (interfering with plaintiff's destruction of an encroaching bridge.) — Ed.

The defendant denied that the poles were erected on the plaintiff's land.

Mr. Justice Fry held that assuming that the poles were erected on the plaintiff's land, the poles and hoarding were not of such a permanent character as to injure the reversion, and dismissed the action with costs.

From this decision the plaintiff appealed.[1]

JESSEL, M. R. I must say, speaking for myself, that this is a most trumpery action, that is when you take away all that has been abandoned by the plaintiff.

The plaintiff is the owner of a cottage in a small street in Halifax which is let for 4*s.* a week. His sole remaining complaint is that the defendant has put up two small poles and a piece of board for the purpose of obstructing one of the windows of the cottage. It is a new window, and the defendant's right to obstruct it is plain enough. He wishes to obstruct it for a legitimate purpose, because his land is building land and he is afraid that the plaintiff will acquire a right of light which may prevent his building on this land. The defendant has not behaved at all unreasonably, he offered to give the plaintiff a license to use the window for 2*s.* 6*d.* a year until he wanted to build on the land. The real complaint of the plaintiff is the obstruction of the window by the board. No doubt he alleges that the poles have been put up on his land; and he also complained of a wall being built, and of a nuisance of the erecting of the board, but those complaints have been abandoned, and it is clear that the only injury really apprehended is the stopping up of the window. The strip of land in dispute is only about one foot nine inches wide and the removal of the poles a few inches back would do the plaintiff no good. The real injury complained of is not the injury done by the poles to the land, but to the cottage. There is no substantial injury at all to the land; it is a bit of vacant land, and it is obvious that running stakes into it is no substantial injury to it. It is equally obvious that the structure is not a permanent one, it can be removed in five minutes, and it is not intended to remain, its object being to obstruct the right only for a year. That being so, the plaintiff is not in a position to maintain an action for trespass because he has a tenant in occupation of the cottage, nor can he maintain an action for the nuisance, because it does not affect him. What he asks is for an injunction to restrain the trespass, though he cannot maintain an action for trespass. No authority has been cited for such a proceeding, nor do I know of any; and I am not inclined to extend the jurisdiction of the court in such a case.

It has been said in argument that the amount of damage to the property has nothing to do with the question. I do not agree with that proposition. I agree that there are cases in which there may be enormous injury to the property, though the actual damage done

[1] The statement of the case is slightly abridged, the argument for the appellant and the concurring judgments of Cotton and Lindley, L. JJ., are omitted. — ED.

by the trespass is nothing; as in Bowser v. Maclean.[1] There the defendant, who was entitled to a mine, was complained of for carrying coals by an underground tramway under the plaintiff's land which he had no right to use. The trespass did no damage to the plaintiff's land, but it was an enormous injury to him, because he would compel the defendant to pay a heavy rent for way-leave. So in Rochdale Canal Company v. King.[2] That was a claim by a canal company to restrain the mill-owners on the banks from taking water from the canal for the use of their mills. The quantity of water abstracted was very small, there was no substantial damage to the canal company, enough water being left for navigation; but as the water belonged to the company, they had a right to claim from the defendants a large sum of money for the privilege of using it, and they were deprived of that profit by the defendants' wrongful act.

Again, in Goodson v. Richardson, the same point arose. That was a case where the owner of some houses, who was constructing waterworks, in carrying the water from the spring to his houses had to pass under a highway, and laid down pipes for that purpose. The ground under the highway belonged to the owners of the soil on each side, and one of them applied for an injunction to restrain the defendant from laying down the pipes. Now the ground under the highway could be of no use to the adjoining owner, and could not be damaged by the defendant's pipes, but as the defendant invaded his property he had a right to restrain him from doing so. It was a valuable property for which he had a right to obtain payment. An injunction was his only remedy, an action at law would have been no remedy to him.

But in the present case the obstruction of the light, which is the real injury complained of, is not caused by the stakes being put on the plaintiff's land; there would be the same injury if they were put further back, and that the defendant is entitled to do. There is no injury to the plaintiff's property of such a nature as to call for the interference of the court by injunction; and the plaintiff not being in possession of the cottage, and the obstruction not being of a permanent nature, and there being therefore no injury to the reversion,[3] the plaintiff's action altogether fails, and the appeal must be dismissed with costs.

1 2 D. F. & J. 415.

2 2 Sim. (N. S.) 78.

3 In the following cases, because of the permanent nature of the injury to land in the possession of the tenant, the reversioner obtained an injunction against the trespasser. Hodgson v. Duce, 2 Jur. N. S. 1014; Schneider v. Brown, 85 Cal. 205; Barbee v. Shannon, 1 Ind. Terr. 199; Brown v. Bridges, 31 Iowa, 138; McCloskey v. Doherty, 97 Ky. 300; Thompson v. Manhattan Co., 130 N. Y. 360; Winthrop v. Manhattan Co., 17 N. Y. Ap. Div. 509; Gorrill v. Toledo Co., 4 Oh. C. C. 398.

There being no injury to the reversion, the reversioner failed to get an injunction in Coney v. Brunswick Co., (Ga. 1902) 42 S. E. 498. — Ed.

ERHARDT *v.* BOARO.

SUPREME COURT UNITED STATES, MARCH 2, 1885.

[113 *United States Reports*, 537.]

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit in equity ancillary to the possession of the mining claim just decided. It is brought to restrain the commission of waste by the defendants pending the action. The bill sets forth the discovery by one Thomas Carroll, a citizen of the United States, while searching on behalf of himself and the plaintiff, also a citizen, for valuable deposits of mineral on vacant unoccupied land of the United States, of the outcrop of a vein or lode of quartz and other rock bearing gold and silver in valuable and paying quantities, the posting by him in his name and that of the plaintiff, at the point of discovery, of a notice that they claimed 1500 feet on the lode, the intrusion of the defendants upon the claim, their ousting the locators, and other facts which are detailed by the record in the case decided, and the commencement of the action at law. It also alleges that the defendants were working the claim, and had extracted from it one hundred and fifty tons, or thereabouts, of ore, containing gold and silver of the value of $25,000, and that about one hundred tons remain in their possession on the premises. The bill prays for a writ of injunction restraining the defendants from mining on the claim, or extracting ore therefrom, or removing any ore already extracted, until the final determination of the action at law. The principal facts stated in the bill are supported by affidavits of third parties. The court granted a preliminary injunction, but, after the trial of the action at law, judgment being rendered therein in favor of the defendants, it dissolved the injunction and dismissed the bill. From the decree of the court the case is brought here by appeal.

It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In Pillsworth *v.* Hopton, which was before Lord Eldon in 1801, he is reported to have said that he remembered being told in early life from the bench "that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction." This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the pre-

mises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings for the determination of the title. Jerome *v.* Ross;[1] Le Roy *v.* Wright.[2]

As the judgment in the action at law in favor of the defendants has been reversed, and a new trial ordered, the reason which originally existed for the injunction continues.[3]

The decree of the court below must, therefore, be reversed, and the cause remanded, with directions to restore the injunction until the final determination of that action; and it is so ordered.

1 7 Johns. Ch. 315, 332.

2 4 Sawyer, 530, 535.

3 U. S. *v.* Gear, 3 How. 120 (mining); U. S. *v.* Parrott, 1 McAll. 271 (mining); Le Roy *v.* Wright, 4 Sawy. 530, 535 (*semble* — but no injunction against erection of a house); Nichols *v.* Jones, 19 Fed. R. 855 (mining); Lanier *v.* Alison, 31 Fed. R. 100 (extracting turpentine); Wood *v.* Braxton, 54 Fed. R. 1005 (cutting timber — unless defendant furnished adequate bond and reported regularly amount of timber cut); St. Louis Co. *v.* Manhattan Co., 58 Fed. R. 129 (*semble* — mining); Thomas *v.* Nantala Co., 58 Fed. R. 485 (mining); Oolagah Co. *v.* McCaleb, 68 Fed. R. 86 (mining); Buskirk *v.* King, 72 Fed. R. 22 (cutting timber); Waterloo Co. *v.* Doe, 82 Fed. R. 45 (cutting timber); King *v.* Campbell, 85 Fed. R. 814 (cutting timber); Northern Co. *v.* Soderberg, 86 Fed. R. 49 (removal of stone); Dimick *v.* Law, 94 Fed. R. 266 (mining — perpetual injunction, title already established at law); Wadsworth *v.* Gorce, 96 Ala. 227 (cutting timber); Hicks *v.* Michael, 15 Cal. 107 (cutting timber); Wiggins *v.* Williams, 36 Fla. 637 (boxing turpentine trees); Moore *v.* Ferrell, 1 Ga. 7 (mining); Griffin *v.* Sketoe, 30 Ga. 300 (cutting timber); Halpin *v.* McCune, 107 Iowa, 495 (mining); Snyder *v.* Hopkins, 31 Kan. 557 (breaking up wild land and building); Flannagan *v.* Krips, 1 Bland, 582 n. (*m*) (carrying off soil); Gittings *v.* Dew, 1 Bland, 583 n. (*n*) (cutting timber); Duvall *v.* Waters, 1 Bland, 569 (cutting timber, except for ordinary cultivation of estate); Davis *v.* Read, 14 Md. 152 (stripping land of timber); Mayor *v.* Groschon, 30 Md. 436 (destroying coal-yard essential to plaintiff's business); Fulton *v.* Harman, 44 Md. 251 (stripping land of timber); Scully *v.* Rose, 61 Md. 408 (mining); Butman *v.* James, 34 Minn. 547 (cutting maple timber — the chief value of land); Kerr *v.* Field, 68 Minn. 317 (occupying room in hotel and injuring business of proprietor); Woods *v.* Riley, 72 Miss. 73 (cutting timber — earlier Mississippi cases Poindexter *v.* Henderson, Walk. 176; Nevitt *v.* Gillespie, 2 Miss. 108; Eskridge *v.* Eskridge, 51 Miss. 522 explained and qualified); Smith *v.* Jameson, 91 Mo. 13 (*semble* — mining); Heman *v.* Wade, 74 Mo. Ap. 339 (quarrying); Graham *v.* Womack, 82 Mo. Ap. 618 (destroying boundary stakes); Boyd *v.* Desrozier, 20 Mont. 444 (mining); Heinze *v.* Butte Co., 20 Mont. 528 (mining); West Point Co. *v.* Reymert, 45 N. Y. 703 (mining — permanent injunction though title disputed and no trial at law); Spear *v.* Cutter, 4 How. Pr. 175 (stripping land of timber); Irwin *v.* Davidson, 3 Ired. Eq. 311 (*semble* — mining); McBrayer *v.* Hardin, 7 Ired. Eq. 1 (mining); McKay *v.* Chapin, 120 N. Ca. 159 (cutting timber); Bishop *v.* Baisley, 28 Oreg. 120 (mining); Norton *v.* Elwert, 29 Oreg. 583 (encroaching house-well); Shubrick *v.* Guerard, 2 Dess. 616 (cutting timber); Burnley *v.* Cook, 13 Tex. 586 (laying out a town and building houses); Harris *v.* Thomas, 1 Hen. & Munf. 18 (destroying timber); Beltman *v.* Harness, 42 W. Va. 432 (mining) *Accord.*

Defendant in Possession but not claiming any Right. — In the following cases an injunction was granted against a defendant who, as he knew, was wrongfully in possession of the land. Brown *v.* Solary, 37 Fla. 102 (mining phosphate); Webster *v.* Cooke, 23 Kan. 637 (excluding plaintiff from pasturing his large flock of sheep at the time when ewes were about to drop lambs); Hall *v.* Nester, 122 Mich. 141 (excluding plaintiff for a whole season from possession of his improvements for rafting logs); Turner *v.* Stewart, 78 Mo. 480 (landing freight at plaintiff's wharf to the serious interruption of plaintiff's business) — Ed.

J. SNYDER AND ANOTHER *v.* J. K. HOPKINS.

SUPREME COURT, KANSAS, JANUARY TERM, 1884.

[31 *Kansas Reports*, 557.]

BREWER, J. This was an action of ejectment, brought by defendant in error, plaintiff below, in the District Court of Allen County. In addition to his prayer for possession, plaintiff asked a temporary injunction restraining the defendants from any beneficial use of the land pending the litigation. On the hearing of this application for a temporary injunction, the district judge made the following order: —

"That the defendants herein, upon the execution of a bond in the sum of $800, conditioned as the law directs, by the plaintiff, be, and each one and all of them are hereby enjoined, until the further order of this court, or the judge thereof, from in any manner disturbing or plowing up the uncultivated or unimproved lands, to wit, the southeast quarter of section twenty-two (22), township twenty-four (24), range twenty (20), Allen County, Kansas, or destroying the sod thereof, or pasturing cattle, horses, or other stock thereon, and from building any houses, fences, or other improvements on said land or any portion thereof. The defendants are also enjoined from running wagons or other agricultural implements or teams of horses or other stock over the lands described in the petition, except for the purpose of reaping and harvesting the growing crops of grain, hay, and fodder that naturally grow upon the uncultivated lands, or that have been grown and raised upon the lands under cultivation by the defendants, or that may hereafter be grown and reaped by them on such cultivated land before the final determination of this suit; subject, however, to the rights of the plaintiff, if he have any, to recover for occupation the rents and profits of such land by defendants."

To reverse this order, defendants have come to this court. On the hearing of the application, plaintiff produced a plain and connected chain of title from the government. It also appeared that about two years prior to the commencement of this action, the land being then vacant and unoccupied, defendants entered and took possession, erected a house, broke up about fifty acres, and made other improvements, and have since used the land for farming purposes.

The petition verified by the plaintiff, and used in the hearing as an affidavit, alleged that the land was specially adapted and was intended by the owner for the production of grass and hay; that in its natural state it was covered by a firm and permanent sod, and that the native grass was more valuable and permanent, and better adapted for the purpose for which the land was set apart and intended, than tame grass, and that the breaking up of the sod would materially injure its value, and further, that the defendants were irresponsible.

Under the showing as made, the plaintiff was the owner, and the

defendants were trespassers. Under those circumstances, was the temporary injunction as granted, proper? Obviously, we think the order was too broad. Doubtless injunction will lie at the instance of the owner, to restrain the cutting down of timber, the quarrying of rock, mineral, etc., or any other act which is in the nature of waste. Iron Co. *v.* Reymert,[1] Wilson *v.* Mineral Point.[2] Upon this principle under the showing as made, it perhaps was not wrong to grant the temporary injunction, restraining the breaking-up of the sod, or the erection of permanent buildings. True, the latter may not be technically waste, but it may under some circumstances injuriously affect the land and place an improper burden upon the true owner in their subsequent removal, and the restoration of the premises to the condition suitable for the purposes for which he designed it and for which it is adapted.

But pending an action for the possession, while the title is disputed and undetermined by a judgment at law, equity ought not to interfere to restrain the defendant from continuing the possession, from the ordinary and natural use of the premises, and the enjoyment of all benefits which flow from possession. If the premises be a farm, the defendant should not be restrained from cultivating the land and enjoying all the benefits which flow from the natural and ordinary use of a farm as a farm. To this end he should be permitted to sow and gather any ordinary crop upon the cultivated ground. He should be permitted to put up any temporary sheds or other buildings necessary for the protection of his stock or the preservation of his crops. He should be permitted to use all the usual agricultural implements in the cultivation of the broken land, not merely in the harvesting of crops, as seems to be indicated by the restraining order, but also in planting and cultivation. He should be at liberty to pasture his stock on the grass lands, providing at least he has no more stock than is ordinarily raised and kept on such a farm. In short, he should be permitted to use the farm in any ordinary way, as such a farm is used, with the single limitation that he commit no waste, and make no substantial and injurious change in its condition. See, in support of this, the following authorities: People *v.* Simonson,[3] Baldwin *v.* York,[4] Bell *v.* Chadwick,[5] Arkill *v.* Selden,[6] Felton *v.* Justice,[7] Crown *v.* Leonard,[8] Seymour *v.* Morgan,[9] Ex parte Foster,[10] Chesapeake *v.* Young.[11] High on Injunctions, 1st ed., §§ 4, 251, 262, 421, and 458, and cases cited in notes to each section referred to.

Perhaps the District Court really intended to do no more than this; but we think the language of the order goes beyond it. The order must be modified, and the case will be remanded with instructions to so modify it that it shall read, that the defendants be enjoined from breaking or in any other manner destroying any more of the unbroken

[1] 45 N. Y. 703. [2] 39 Wis. 160. [3] 10 Mich. 335. [4] 71 N. C. 463.
[5] 71 id. 329. [6] 1 Barb. 316. [7] 51 Cal. 529. [8] 32 Ga. 241.
[9] 45 id. 201. [10] 11 Ark. 304. [11] 3 Md. 480.

sod, from erecting any permanent buildings, or in any other manner substantially changing the condition of the farm.

The costs of this court will be divided.

All the justices concurring.[1]

H. ECHELKAMP, Respondent, *v.* B. SCHRADER, Appellant.

Supreme Court, Missouri, March Term, 1870.

[45 *Missouri Reports*, 505.]

Currier, J.[2] These parties, as the case finds, were adjoining landowners, and derived title from a common grantor. The line dividing their respective lots, as they supposed, passed through the centre of a double house, one half of which was believed by them to be on the plaintiff's lot, and the other half on the defendant's, thus furnishing to each party a connected, but independent, tenement. At the time the suit was brought the plaintiff had been in peaceable possession of his lot and tenement some seventeen years. The house was a frame building, and was standing on the premises at the time of the plaintiff's purchase. It appeared, however, from a late and careful survey,

[1] An injunction against the use of land by a defendant in possession was denied in the following cases: New Jersey Co. *v.* Gardner Co. 113 Fed. R. 395 (preparing and marketing lumber to save loss, defendant giving a bond of indemnity); Kellar *v.* Bullington, 101 Ala. 267 (removing small quantity of stone); Myers *v.* Hawkins, 67 Ark. 413 (cutting timber); Felton *v.* Justice, 51 Cal. 529; (using plaintiff's ditch to ruin of his vineyard); Carney *v.* Hadley, 32 Fla. 344 (boxing trees for turpentine); Woodford *v.* Alexander, 35 Fla. 333 (stripping land of cypress-trees — but case overruled in Brown *v.* Solary, 37 Fla. 102, 113); Hillman *v.* Hurley, 82 Ky. 626 (cutting timber in moderate quantity); Duvall *v.* Waters, 1 Bland. 569 (cultivating farm in usual mode); Herr *v.* Bierbrower, 3 Md. Ch. 456 (rebuilding on old foundation — defendant in possession for 40 years); Green *v.* Keen, 4 Md. 98 (felling timber in moderate quantity); Powell *v.* Rawlings, 38 Md. 239 (cutting pine-trees, good only for firewood); Shreve *v.* Black, 4 N. J. Eq. 177 (stripping off of young growth of wood); West *v.* Page, 9 N. J. Eq. 119 (cutting timber — defendant successful in prior litigation as to title); Cornelius *v.* Post, 9 N. J. Eq. 196 (insufficient evidence as to extent of cutting timber); Storm *v.* Mann, 4 Johns. Ch. 21 (nature of use of property not disclosed); Thompson *v.* Williams, 1 Jones, Eq. 176 (improving land in new country in usual way); Gause *v.* Perkins, 3 Jones, Eq. 177 (boxing turpentine trees — normal use of the land); Bell *v.* Chadwick, 71 N. Ca. 329 (boxing turpentine trees); Parker *v.* Parker, 82 N. Ca. 165 (gold mining — but if defendant is insolvent, receiver to be appointed to secure profits); McCormick *v.* Nixon, 83 N. Ca. 113 (cutting timber for ordinary building); Dunkart *v.* Rinehart, 87 N. Ca. 224 (cutting 15 trees in the woods); Roper Co. *v.* Wallace, 93 N. Ca. 22 (mining — receiver if defendant insolvent); Lewis *v.* Roper Co., 99 N. Ca. 11 (mining — receiver if defendant insolvent); Ousby *v.* Neal, 99 N. Ca. 146 (cutting trees — if defendant gives adequate bond); Sharpe *v.* Loane, 124 N. Ca. 1 (cutting timber — if defendant gives adequate bond); Leininger's App., 106 Pa. 398 (clearing waste land and mining — because remedy at law by ejectment and estrepement were adequate); McMillan *v.* Farrell, 7 W. Va. 223 (cutting timber); Cox *v.* Douglass, 20 W. Va. 175 (cutting timber); Schoonover *v.* Bright, 24 W. Va. 698 (cutting timber); Cresap *v.* Kemble, 26 W. Va. 603 (cutting timber); Watson *v.* Ferrell, 34 W. Va. 406 (cutting timber); Burns *v.* Mearns, 44 W. Va. 744 (cutting timber); Bracken *v.* Preston, 1 Pinn. (Wis.) 584 (mining — because no action at law pending). — Ed.

[2] Only the opinion of the court is given. — Ed.

that the plaintiff's tenement, or half of the double house, was in fact three feet on the defendant's ground, or on ground embraced within the limits of his original lot.

In the month of January, 1869, the defendant, wishing to remove his share of the house for the purpose of rebuilding, notified the plaintiff thereof, and of his intention to sever the house on the line dividing their respective lots. In pursuance of this plan, the defendant employed careful and competent parties to saw through the house on the true line of division between the lots, cutting three feet from the tenement occupied by the plaintiff. The work was commenced, whereupon the plaintiff instituted these proceedings for injunction. A temporary injunction was granted, which was subsequently made permanent. The defendant appeals from the judgment of the court granting the perpetual injunction. The question is thus raised whether the facts stated warranted the action of the court.

1. The jurisdiction of courts of chancery in cases of trespass is of modern origin, and it is uniformly held that an injunction will not be awarded to restrain the commission of an ordinary trespass where the injury flowing from it is not irreparable, and where an adequate remedy may be had in the recovery of damages against a solvent party. Chancellor Kent reviews the subject elaborately in Jerome *v.* Ross,[1] and reaches the result above stated. He says: "I do not know a case in which an injunction has been granted to restrain a trespasser merely because he is a trespasser." (See also James *v.* Dixon,[2] Smith *v.* Pettingill;[3] 2 Sto. Eq. Jur., § 928; Hill. on Injunc. 279, ch. 10.)

2. While chancery will not use its extraordinary powers to restrain by injunction a "trespasser merely because he is a trespasser," it will, nevertheless, interfere by injunction where the acts done or threatened are ruinous to the property trespassed upon, or are of a character to permanently impair its just enjoyment in the future, as when a trespasser digs into and works a mine to the injury of the proprietor, or where timber is attempted to be cut down by a trespasser in collusion with the tenant of the land; or where there is a dispute respecting the boundaries of estates, and one of the claimants is about to cut down ornamental trees in the disputed territory. "In short," says Judge Story, "an injunction is now allowable in all cases of timber, coals, ores, or quarries, when the party is a mere trespasser, or where he exceeds the limited rights with which he is clothed, upon the ground that the acts are or may be an irreparable damage to the particular species of property." (See 2 Sto. Eq. Jur., §§ 860, 928, 929, and the numerous cases cited.)

This doctrine is abundantly sustained by the authorities, and has become incorporated into the general system of equity jurisprudence. The case at bar clearly falls within the principle enunciated. The acts of the defendant done or threatened, and which he admits, are of a character to destroy the plaintiff's dwelling-house as a place fit for human habitation. He proposed to remove one entire end of the build-

[1] 7 Johns, Ch. 315. [2] 20 Mo. 79. [3] 15 Verm. 82.

ing, leaving the interior of the plaintiff's house exposed and wholly unprotected. If an injunction will issue to restrain a trespasser from interfering with a party's timber, coals, ores, or ornamental trees, it will not be denied, other things being equal, when it is invoked to save a party's domicile from disturbance and substantial destruction, so far as its usefulness as a place of residence is concerned.[1]

[1] In the following cases, because of the inadequacy of the remedy at law in damages, a plaintiff in possession obtained an injunction (in nearly all the cases a temporary injunction) against a trespasser asserting a right to enter. Chusiman *v.* Shreve, 37 Fed. R. 36 (mining); Santee Co. *v.* James, 50 Fed. R. 360 (breaking up plaintiff's lumbering business); Smith *v.* Bivens, 56 Fed. R. 352 (continuous pasturing of plaintiff's land); Lake Shore Co. *v.* Felton, 103 Fed. R. 227 (use of plaintiff's railroad); Lyon *v.* Hunt, 11 Ala. 295 (entry to dig and remove soil); Swann *v.* Jenkins, 82 Ala. 470 (mining); Sullivan *v.* Rabb, 86 Ala. 433 (cutting timber); Mooney *v.* Coolidge, 30 Ark. 640 (entry to remove buried bodies); Hooper *v.* Dora Co., 95 Ala. 235 (dumping refuse mining products on land); Merced Co. *v.* Fremont, 7 Cal. 317 (mining); Daubenspeck *v.* Grear, 18 Cal. 443 (destroying fruit trees); More *v.* Massini, 32 Cal. 590 (quarrying asphaltum); Silva *v.* Garcia, 65 Cal. 591 (destroying fruit trees); Crescent Co. *v.* Simpson, 77 Cal. 286 (removing wharf and buoys); Schneider *v.* Brown, 85 Cal. 205 (cutting a half-mile ditch to damage of two acres); Derry *v.* Ross, 5 Colo. 295 (interrupting plaintiff's mining operations); Wetherell *v.* Newington, 54 Conn. 67 (destroying ornamental trees); Indian Co. *v.* East Co., 28 Fla. 387 (landing at plaintiff's dock to serious detriment of his business); Justices *v.* Griffin Co., 11 Ga. 246 (destroying toll-gate); Bates *v.* Slade, 76 Ga. 50 (removing clay); Camp *v.* Dixon, 112 Ga. 872 (stripping land of timber); Goettee *v.* Lane, (Georgia, 1896) 25 S. E. R. 736 (cutting timber); McIntyre *v.* Storey, 80 Ill. 127 (tearing down fences for highway); Joliet *v.* Warner, 166 Ill. 34 (removal of sidewalk); Edwards *v.* Haeger, 180 Ill. 99 (cutting pipes, supplying water to large dairy barn); Itasca *v.* Schroeder, 182 Ill. 192 (destroying ornamental trees and buildings); Jenney *v.* Jackson, 6 Ill. Ap. 32 (removing fixtures); Cook Co. *v.* Lebanon Co., 92 Ill. Ap. 526 (ousting of plaintiff and stopping his business); Barbee *v.* Shannon, 1 Ind. Terr. 199 (tearing down fences); Erwin *v.* Fulk, 94 Ind. 234 (putting roadway through farm); Grant *v.* Crow, 47 Iowa, 632 (erecting fence on plaintiff's land); Bolton *v.* McShane, 67 Iowa, 207 (tearing down fences and damaging shrubs and trees); Chicago Co. *v.* Porter, 72 Iowa, 426 (erecting buildings); Poirier *v.* Fetter, 20 Kan. 47 (tearing down fences for highway); Sword *v.* Allen, 25 Kan. 67 (breaking dam and stopping mill); Long *v.* Kasebeer, 28 Kan. 226 (ousting plaintiff in order to build); Dela Croix *v.* Villere, 11 La. An. 39 (extensive destruction of forest trees); State *v.* Judge, 52 La. An. 103 (same as preceding case); Dudley *v.* Hurst, 67 Md. 44 (removal of machinery from corn canning factory); Clayton *v.* Shoemaker, 67 Md. 216 (erecting building on plaintiff's land); Long *v.* Ragan, (Md. 1902) 51 Atl. R. 181 (building a house-wall on plaintiff's land); Winslow *v.* Nayson, 113 Mass. 411 (destroying fences and shade trees); Ryan *v.* Brown, 18 Mich. 196 (destroying dock and cribs for extension of dock); Althen *v.* Kelly, 32 Minn. 280 (quarrying rock); State Bank *v.* Kercheval, 65 Mo. 682 (removing office, part of a mill); McPike *v.* West, 71 Mo. 199 (opening a way, spoiling hedge and crops); Shafer *v.* Stull, 32 Neb. 94 (tearing down fences to damage of crops); Peterson *v.* Hopewell, 55 Neb. 670 (destruction of land by a highway); Pohlman *v.* Lohninger, 60 Neb. 364 (tearing down fences); Axthelm *v.* Chicago Co., (Neb. 1902) 89 N. W. R. 313 (removing gate at railroad crossing); Winnipissiogee Co. *v.* Wooster, 29 N. H. 433 (destroying dams and stopping mills); Tainter *v.* Mayor, 19 N. J. Eq. 46 (*semble* — destroying fences and ornamental trees); De Veney *v.* Gallagher, 20 N. J. Eq. 33 (removal of part of dwelling-house); Southmayd *v.* McLaughlin, 24 N. J. Eq. 181 (erecting building); Doughty *v.* Commissioners, 33 N. J., 1 Eq. (removing ornamental trees); Piper *v.* Piper, 38 N. J. Eq. 81 (stripping land of timber); Johnson *v.* Rochester, 13 Hun, 285 (making public way); Mulry *v.* Norton, 100 N. Y. 424 (entry on beach to exclusion of plaintiff's tenants); Flood *v.* Van Wormer, 147 N. Y. 284 (removal of plaintiff's house); Evans *v.* Board, 84 Hun, 206 (removal of shade trees); Hinckel *v.* Stevens, 17 N. Y. Ap. Div. 279 (interfering with harvesting of ice in plaintiff's pond); Elsheimer *v.* Niagara Falls, 17 N. Y. Ap. Div. 618 (cutting off part of house); Purnell *v.* Daniel, 8 Ired. Eq. 9 (washing away part of plaintiff's land); McArthur *v.* Kelly, 5 Oh. 139 (building dam and mill race); Lembeck *v.* Nye, 47 Oh. St. 336 (fishing on plaintiff's lake); Haines *v.* Hall 17 Oreg. 165 (breaking down banks of stream); Allen *v.* Dunlap, 24 Oreg. 229 (mining); Mendenhall *v.* Water Co., 27 Oreg. 38 (widening ditch, throwing earth on banks and cutting down trees); Masson's Ap., 70 Pa. 26 (using plaintiff's party-wall); Allison's Ap. 77

3. But the defendant, by his answer, contests the plaintiff's title, and the case fails to find who held the title to the *locus in quo* at the time the suit was commenced. It is found that the plaintiff had been in peaceable possession for about seventeen years; but whether this possession was adverse, under claim of title, does not appear. For aught that is shown to the contrary, it is possible that the title may be in the defendant, as it apparently is, unless the plaintiff's possession was hostile and adverse. If he has the title, then he has a right of possession, and ought not to be precluded from acquiring it. But if the injunction stands, he is under a permanent judicial inhibition against in "any wise" meddling with the property. His right to litigate the title in an action at law should be preserved to him. In Irwin *v.* Dixon,[1] the court says: "When the right or title to the place in controversy, or to do the act complained of, is, as here, doubtful, and explicitly denied in the answer, no permanent or perpetual injunction will usually be granted till such trial at law is had settling the contested rights and interests of the parties." [2] See Stewart *v.* Chew,[3] Falls Village Water Power Co. *v.* Tibbetts.[4] In order, therefore, to preserve to the defendant such legal rights in the premises as he may have, if any, and to give him an opportunity to establish them in an action at law, the judgment of the court below, making the injunction perpetual, will be reversed; the temporary injunction, in the meanwhile, being continued, and to be made permanent unless the defendant shall immediately institute his suit at law to establish his title to the disputed premises, and prosecute the same with effect.

It is usual in cases like this, where the title itself comes in controversy, to grant a temporary injunction to await the event of an action at law to be prosecuted by the plaintiff. But here the plaintiff is in actual possession, and has been for many years, and is therefore not in a position, nor has he any occasion, to sue. The defendant is the proper party to bring an action and test the rights of the respective parties at law. If he neglects to do this in a reasonable time, he will have no just grounds of complaint if the injunction is made perpetual against him in consequence of his own negligence.

Pa. 221 (sinking a well); Jennings *v.* Beale, 158 Pa. 283 (mining coal); Munson *v.* Tryon, 6 Phila. 395 (mining coal); Echert *v.* Ferst, 10 Phila. 514 (cutting timber); Kinsler *v.* Clarke, 2 Hill, Ch. 617 (cutting timber); Strawberry Co. *v.* Chipman, 13 Utah, 454 (grazing land with sheep); Smith *v.* Rock, 59 Vt. 232 (cutting timber); Murphy *v.* Lincoln, 63 Vt. 278 (continued use of land as a roadway); Griffith *v.* Hilliard, 64 Vt. 636 (cutting timber); Stetson *v.* Stevens, 64 Vt. 649 (cutting timber); Anderson *v.* Harvey, 10 Gratt. 386 (mining); Moore *v.* Jennings, (West Virginia, 1899) 34 S. E. R. 793 (drilling oil and gas wells); Wilson *v.* Mineral Point, 39 Wis. 160 (cutting down ornamental trees and shrubbery). — Ed.

[1] 9 How. 28.

[2] Bateman *v.* Johnson, Fitzg. 106; Ashurst *v.* McKenzie, 92 Ala. 484; Wadsworth *v.* Gorce, 96 Ala. 227; Carney *v.* Hadley, 32 Fla. 344; Chicago Exchange *v.* McClaughry, 148 Ill. 372; Clayton *v.* Shoemaker, 67 Md. 216; Sills *v.* Goodyear, 80 Mo. Ap. 128; Bean *v* Coleman, 44 N. H. 539; Delaware Co. *v.* Breckenridge, 55 N. J. Eq. 141, 593; Irwin *v.* Davidson, 3 Ired. Eq. 311; Ross *v.* Page, 6 Oh. 166; Norton *v.* Elcourt, 29 Oreg. 583; Washburn's Ap. 105 Pa. 480; McGregor *v.* Silver King Co., 14 Utah, 47; Schoonover *v* Bright, 24 W. Va. 698; Smith *v.* Oconomowoc, 49 Wis. 694 *Accord.* — Ed.

[3] 3 Bland's Ch. 440.

[4] 31 Conn. 165.

For the reason stated, the judgment will be reversed and the cause remanded, to be proceeded with by the Circuit Court in accordance with the views herein expressed State *v.* Mobile.[1] The other judges concur.[2]

JOSHUA WASHBURN *v.* EDWARD F. MILLER.

SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH 1, 1875.

[117 *Massachusetts Reports*, 376.]

BILL in equity, filed April 24, 1873, alleging the following facts: — In 1822, the plaintiff became the owner in fee of a lot of land in Auburndale; and in 1847 laid out a private way over a portion of it and built a fence on the line of the way. In 1858, the plaintiff sold a portion of the land bounding it on the way, and conveyed to Ai Blood a right to use the way by a deed which is set forth in the preceding case.[3] It was the understanding and agreement between the plaintiff and Blood that the way was only to be used for reaching the northerly portion of the land conveyed to him, and that all buildings put upon the said land by Blood and his assigns should be built northerly of the plaintiff's house on the other side of the way.

The bill then set forth the conveyance by Blood to Miller of the southerly portion of the lot, that Miller had built a house and barn southerly of the line in violation of the agreement between the plain-

[1] 5 Porter, Ala. 317.

[2] The refusal of a court of equity to grant a permanent injunction until the plaintiff's title, if controverted, is established in a common law court, does not result from any want of jurisdiction. Whether the settlement of the legal title shall be referred to a common law court is not a question of the power of the court of equity, but of policy. Accordingly, if a defendant has not made the point in the court below that the title should be tried at common law, the appellate court may and commonly does determine the question of title. Waterloo Co. *v.* Doe, 82 Fed. R. 45; Derry *v.* Ross, 5 Colo. 295; Tantlinger *v.* Sullivan, 80 Iowa, 218; Hoff *v.* Olson, 101 Wis. 118, 121–122 (discrediting Smith *v.* Oconomowoc, 49 Wis. 694). But see *contra*, Ballantine *v.* Harrison, 37 N. J. Eq. 561; Hart *v.* Leonard, 42 N. J. Eq. 416; Delaware Co. *v.* Breckenridge, 55 N. J. Eq. 141, 144, 593.

If the controversy turns upon the construction of a deed, so that there is no question of fact for a jury, the equity judge will settle the controversy. Belknap *v.* Belknap, 2 Johns. Ch. 463; Mohawk Co. *v.* Artcher, 6 Paige, 83; Jennings *v.* Beale, 158 Pa. 283. But see *contra*, Delaware Co. *v.* Breckenridge, 55 N. J. Eq. 141, 593.

By statute it is provided in some jurisdictions that the court of equity shall determine the whole case, even though the title of the plaintiff is disputed. West Point Co. *v.* Reymert, 45 N. Y. 703; Broistedt *v.* South Side Co., 55 N. Y. 220; Hinckel *v.* Stevens, 17 N. Y. Ap. Div. 279.

In some states the court of equity, without the aid of a statute, acting upon the principle of avoiding the resort to two courts, determines the question of disputed title. Ladd *v.* Osborne, 79 Iowa, 93; Pohlman *v.* Lohninger, 60 Neb. 364.

In the following cases a perpetual injunction was granted without referring the question of disputed title to a common law court, but the defendant seems not to have raised any objection. Poirier *v.* Filter, 20 Kan. 47; Long *v.* Ragan (Md. 1902), 51 Atl. R. 181; Lembeck *v.* Nye, 40 Oh. St. 336.

In Pennsylvania if the plaintiff's title is clear, although denied by the defendant, the case is not referred to a common law court. Miller *v.* Lynch, 149 Pa. 460. — ED.

[3] 117 Mass. 371.

tiff and Blood, had taken down the fence along the private way and had filled up a gutter which the plaintiff had built on the westerly side of said way for the purpose of keeping the water from the highway from flowing on to his land; that Miller had committed various trespasses on the private way; and had brought an action at law for an alleged trespass by the plaintiff, which action was still pending.

The bill prayed that the defendant might be enjoined from prosecuting the action at law, and might be restrained from trespassing on the private way, and that the buildings on the defendant's line might be removed northerly of the line of the plaintiff's house.

To this bill the defendant demurred.

DEVENS, J.[1] The plaintiff seeks to maintain the bill upon the ground of repeated trespasses by the defendant upon his private way by passing and repassing thereon, and by doing thereon various other acts for the purpose of rendering the same more convenient for his own use.

It is not doubted that an injunction could properly be issued to restrain one from the commission of an alleged trespass where the damage liable to be occasioned thereby would be irreparable; but in such case it would be for the purpose only of enabling the party, whose rights were alleged to be invaded, to test them in a court of law. So where acts of the nature alleged in the bill had been held, in previous suits brought by the plaintiff, to be trespasses, and his title thus fully shown, and it further appeared that damages would not be an adequate compensation for them, it might be proper that a party continuing to commit them should be permanently restrained by injunction. No such case is here presented; it is not averred that irreparable damage is liable to be done, nor are any facts stated which indicate that damages would not adequately compensate the plaintiff. No suit at law has apparently been brought by the plaintiff to establish his right to the way in question as against the defendant; but it does appear that the defendant has brought a suit against the plaintiff for interfering with him in the use of it by certain alterations made by him, and against the prosecution of this suit the plaintiff prays for an injunction. By the bill, therefore, he simply endeavors to remove into this court the determination of the rights of the parties in the use of the way. This should not be done; it is a matter appropriate to the jurisdiction of a court of common law, and if the rights of the plaintiff have been invaded, its powers are ample to afford him an adequate remedy.

Nor can the bill be maintained because it will prevent a multiplicity of suits. All the trespasses as set forth may be made the subject of a single action in which the plaintiff may recover such damages as he shall show he has sustained. There are no embarrassments arising from complicated or conflicting rights of different

[1] A portion of the opinion is omitted. — ED.

parties which would justify this court sitting as a court of equity in taking jurisdiction of the controversy.

Demurrer sustained.[1]

P. RICHARDS, Appellant, *v.* J. DOWER, Respondent.

Supreme Court, California, July 31, 1883.

[64 *California Reports*, 62.]

Sharpstein, J.[2] The court found, that at the time of the commencement of this action the defendant had excavated and projected a tunnel under the lot of the plaintiff, a distance of fifteen feet, and

[1] Hanson *v.* Gardiner, 7 Ves. 305 (cutting timber); North Union Co. *v.* Bolton Co., 3 Railw. Cas. 345 (using a railway); Roebling Co. *v.* First Bank, 30 Fed. R. 744 (building wire tramway); Kennedy *v.* Elliott, 85 Fed. R. 832 (entry upon land); Ellsworth *v.* Hale, 33 Ark. 633 (entry to remove building materials); Tomlinson *v.* Rubio, 16 Cal. 202 (ousting plaintiff to great injury of his business — but see criticism in Tevis *v.* Ellis, 25 Cal. 515, 520); Leach *v.* Day, 27 Cal. 643 (pulling down fence); Mechanics Foundry *v.* Ryall, 75 Cal. 601 (entering plaintiff's foundry — true remedy was forcible exclusion — see, also, Delyroot *v.* Peters, 124 Cal. 406, 408); California Co. *v.* Union Co., 122 Cal. 641, 126 Cal. 433, 442 (landing at plaintiff's wharf); Hatcher *v.* Hampton, 7 Ga. 49 (deadening growing timber); Bethune *v.* Wilkins, 8 Ga. 118 (threats to oust plaintiff); Catching *v.* Terrell, 10 Ga. 576; Sullivan *v.* Hearndon, 11 Ga. 294 (threat to dispossess plaintiff — compare Justice *v.* Aikin, 104 Ga. 714, in which case defendant was insolvent); Crown *v.* Leonard, 32 Ga. 241 (putting a building on plaintiff's land); Waters *v.* Lewis, 106 Ga. 758 (entry upon land); Hamilton *v.* Stewart, 59 Ill. 330 (entry to remove fixtures); Thornton *v.* Roll, 118 Ill. 350 (carrying off a small quantity of soil); Chicago Exchange *v.* McClanghry, 148 Ill. 372 (cutting of telegraphic communication with rooms demised to plaintiff's tenants and consequent loss of rentals); Commissioners *v.* Green, 156 Ill. 504 (tearing down fences); Harms *v.* Jacobs, 158 Ill. 505 (tearing down fences); Taylor *v.* Pearce, 71 Ill. Ap. 525 (tearing down fences); Jones *v.* Gray, 78 Ill. Ap. 309 (tearing down fences); Cooper *v.* Hamilton, 8 Blackf. 377 (entry to remove rails); Miller *v.* Burket, 132 Ind. 469 (entry to cut a crop of wheat, making no claim to the land); Wilson *v.* Hughell, Morr. (Iowa) 461 (cutting timber — quantity not stated); Cowles *v.* Shaw, 2 Iowa, 496 (cutting and carrying off a small quantity of wood); Hamilton *v.* Ely, 4 Gill, 34 (quarrying stone); Schurmeier *v.* St. Paul Co., 8 Minn. 113 (erection of easily removable trestlework); Weigel *v.* Walsh, 45 Mo. 569 (plaintiff a lessee with only two weeks left of the term); Taylor *v.* Todd, 48 Mo. Ap. 550 (opening of public way); Crenshaw *v.* Cook, 65 Mo. Ap. 264 (repeated entries); Bean *v.* Coleman, 44 N. H. 539 (opening and not closing bars); West *v.* Walker, 3 N. J. Eq. 279 (cutting timber); Kerlin *v.* West, 4 N. J. Eq. 449 (clearing away dead timber); Cross *v.* Mayor, 18 N. J. Eq. 315 (narrowing sidewalk for benefit of street); Doughty *v.* Board, 33 N. J. Eq. 1 (similar to preceding case); Ballantine *v.* Harrison, 37 N. J. Eq. 560 (making a roadway); Jerome *v.* Ross, 7 Johns. Ch. 315 (taking gravel of little value); N. Y. Co. *v.* Fitch, 1 Paige, 97 (using plaintiff's dock); Blake *v.* Brooklyn, 26 Barb. 301 (raising level of plaintiff's lot); Murray *v.* Knapp, 62 Barb. 566, 42 How. Pr. 462 s. c. (landing on plaintiff's shore); Justices *v.* Colby, 5 Jones, Eq. 254 (building house on plaintiff's land); Frink *v.* Stewart, 94 N. Ca. 484 (repeated removal of post); Bond *v.* Wool, 107 N. Ca. 139 (pulling down a fish-house); Ross *v.* Page, 6 Oh. 166 (landing passengers to cross plaintiff's land); Smith *v.* Gardner, 12 Oreg. 221 (crossing plaintiff's land); Parker *v.* Furlong, 37 Oreg. 248 (digging on plaintiff's land); Clark's Ap. 62 Pa. 447 (in moving cooking-range and other fixtures, easily replaced, from plaintiff's hotel); Minnig's Ap. 82 Pa. 373 (moving fence two feet back); Washburn's Ap. 105 Pa. 480 (continual entry upon land); McGregor *v.* Mining Co., 14 Utah, 47 (dike over barren land); Smith *v.* Pettingill, 15 Vt. 82 (entry to cut grass); Meeker *v.* Gilbert, 3 Wash. T. 369 (moving fence back); Lazzell *v.* Garlow, 44 W. Va. 466; Smith *v.* Oconomowoc, 49 Wis. 695 (removal of fence and storm door) *Accord.* — Ed.

[2] Only the opinion of the court is given. — Ed.

was engaged in the further extension thereof, and threatened to continue the same, but that said tunnel has not affected and will not, if completed, affect injuriously or otherwise the surface ground of plaintiff's said lot. There is a further finding, "that the driving of the tunnel was not and will not, if completed, cause the plaintiff irreparable injury or injure said lot in any way." And another, "that the defendant is not insolvent." And as a conclusion of law from the foregoing facts, the court found that the defendant was entitled to a dissolution of an injunction previously granted, and ordered judgment to be entered to that effect. From that judgment the plaintiff appealed, and the questions which the record presents are: 1. Did the court err in its said conclusion of law? 2. Was the continuation or dissolution of the injunction, by the court which granted it, so much a matter of discretion as to preclude any interference here with the action of that court in the premises? As late as Mogg *v.* Mogg, Lord Thurlow was unable to find a precedent for granting an injunction to restrain a mere trespasser from cutting timber on another person's land. But in Flamang's case, where a landlord of two closes had let one to a tenant, who took coal out of that close, and also out of the other, which was not demised, the difficulty was whether the injunction should go as to both, and Lord Thurlow ordered it as to both; and on the authority of that case Lord Eldon, in Mitchell *v.* Dors, granted "an injunction against the defendant, who, having begun to get coal in his own ground, had worked into that of the plaintiff."

In Thomas *v.* Oakley, Lord Eldon expressed the opinion that it had then been settled in England that an injunction would be granted to restrain a mere trespasser from cutting timber, or taking coal or lead ore from another person's land, and in that case he granted an injunction to restrain the defendant from removing stone from the plaintiff's quarry, on the ground that the defendant was taking the substance of the inheritance — removing that which was the plaintiff's estate. He said the difference in value between stone and coal, or stone and lead ore, could not be considered in that case; from which we infer that in his opinion the right to an injunction in such a case did not depend on the value of the substance which was threatened with removal, but upon the fact of its constituting the inheritance or estate of its owner. And in that light the kind or quality of the substance would be quite as immaterial as the value of it. And such we understand to be the rule in this State. In More *v.* Massini,[1] the court says: "The gravamen is a threatened trespass upon land. The trespass is in the nature of waste, and it will be committed unless the defendant is restrained. Should the threat be fulfilled, the plaintiff would be deprived of a part of the substance of his inheritance, which could not specifically be replaced. In the class to which this case belongs no allegation of insolvency is necessary. The injury is irreparable in itself." (Citing Merced Mining Co. *v.* Fremont;[2] Hicks *v.* Michael;[3] Leach *v.* Day;[4] People *v.* Morrill.[5])

[1] 32 Cal. 594. [2] 7 Cal. 322. [3] 15 Cal. 116.
[4] 27 Cal. 646. [5] 26 Cal. 360.

The findings show that the tunnel which the defendant is constructing through the plaintiff's land is of a permanent character. It disturbs the plaintiff's possession, and if permitted to continue will ripen into an easement. That of itself is sufficient to entitle him to an injunction. Poirier *v.* Fetter;[1] Johnston *v.* City of Rochester;[2] Williams *v.* N. Y. Cent. R. R. Co.[3]

The finding that the injury is not irreparable is inconsistent with the findings which describe the character of the work which it is sought to have enjoined. "The injury is irreparable in itself," and the solvency of the defendant is an immaterial circumstance.

The findings leave no room for doubt as to the plaintiff's title to the premises, and that, coupled with the fact that the threatened injury is *per se* irreparable, entitles the plaintiff to the relief demanded in his complaint; and we think the error committed by the court in dissolving the injunction should be corrected.

Cases of palpable error or abuse of discretion are excepted from the rule under which this court declines to interfere with the granting, refusing, continuing, or dissolving of injunctions; and that rule applies more especially, if not exclusively, to preliminary injunctions. We do not think that it applies to a case in which an injunction is continued or dissolved after trial and findings upon all the material issues.

In that case, as in any other in which the findings do not support the judgment, it should be reversed.

Judgment reversed and cause remanded with directions to the court below to enter judgment on the findings, that the injunction issued in the first instance be perpetual, and that the plaintiff recover his costs.

MYRICK, J., and THORNTON, J., concurred.[4]

[1] 20 Kan. 47. [2] 13 Hun, 285. [3] 16 N. Y. 97.

[4] In the following cases an injunction was granted against a defendant, who without claim of right threatened a serious or continuing trespassing upon the plaintiff's premises. Northern Co. *v.* Hussey, 61 Fed. R. 231 (stripping land of timber); U. S. *v.* Guglard, 79 Fed. R. 21 (cutting timber); King *v.* Stuart, 84 Fed. R. 546 (cutting timber); Northern Co. *v.* Cunningham, 103 Fed. R. 708 (destroying bunch grass by sheep); Walker *v.* Emerson, 89 Cal. 456 (entry to divert waters); Kellogg *v.* King, 114 Cal. 378 (injury to shooting privilege); N. Y. Co. *v.* Scovill, 71 Conn. 136 (repeated entries by hackman); Powell *v.* Cheshire, 70 Ga. 357; Davidson *v.* Reed, 111 Ill. 167 (defacing graves); Stroup *v.* Chalcraft, 52 Ill. Ap. 608 (destruction of fences); Thatcher *v.* Humble, 67 Ind. 444 (destruction of walnut trees); Poirier *v.* Fetter, 20 Kan. 47 (breaking fences); Shipley *v.* Ritter, 7 Md. 408 (cutting shade and ornamental trees); Boston Co. *v.* Sullivan, 177 Mass. 230 (repeated entries by hackman); Carpenter *v.* Grisham, 59 Mo. 24 (taking plaintiff's land for highway); Sankey *v.* St. Mary's Academy, 8 Mont. 265 (erecting fences obstructing light); Palmer *v.* Israel, 13 Mont. 209 (disturbing contractor's possession of street); Lee *v.* Watson, 15 Mont. 228 (interfering with plaintiff's cultivation of his farm); Sapp *v.* Roberts, 18 Neb. 299 (destroying osage fence); Ellis *v.* Blue Mountain Co., 69 N. H. 385 (escape of animals from defendant's park); Scudder *v.* Trenton Co., Sax. 694 (destroying ornamental trees); Ketchum *v.* Depew, 81 Hun, 278 (*semble*); Walters *v.* McElroy, 151 Pa. 549 (repeated entries upon land); McClellan *v.* Taylor, 54 S. Ca. 430 (repeated breaking down of fences); Bruce *v.* Roper Co., 87 Va. 381 (cutting timber).

(*Title established at law.* — If the plaintiff's title has been established at law, his right to an injunction against a continuation of the trespass is clear.) Slater *v.* Gunn, 170 Mass. 509; Delaware Co. *v.* Breckenridge, 57 N. J. Eq. 154; Livingston *v.* Livingston, 6 Johns. Ch. 497. — ED.

MEHITABLE GATES *v.* JOHNSTON LUMBER CO.

SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY 26, 1899.

[172 *Massachusetts Reports*, 495.]

BILL in equity, filed May 29, 1897, alleging the following facts.

The plaintiff was the owner of a certain parcel of land in Southborough. On July 18, 1896, there was on said parcel a quantity of bricks, the title of which was partly in one Rooke, an insolvent debtor, and in the plaintiff as mortgagee. By her consent, the same was sold at public auction to the defendant company by the assignee of Rooke, to be removed and taken away in a fortnight's time from that date, July 18, and she notified the defendant to remove and take away the bricks within that time. Afterwards the defendant promised so to do, and the plaintiff gave the defendant until August 31, 1896, to remove and take away the same, and refused and continued to refuse to give the defendant company permission further to enter upon the premises for any purpose whatsoever, and posted notices against all trespassers according to law.

The defendant wholly neglected to remove the bricks; and notwithstanding the plaintiff's refusal of permission to enter upon the premises to remove the same after the time set therefor and extended for that purpose as aforesaid, the defendant broke into the premises against the plaintiff's will and permission and trespassed thereon, and took and carried away therefrom certain bricks, the property of the plaintiff, and threatened to continue so to do for an indefinite period.

The prayer was for an injunction, and that the defendant be required to pay the plaintiff the value of the bricks unlawfully removed, and such other damages as were caused by the trespass. The defendant demurred, assigning as ground therefor that the plaintiff had a plain, complete, and adequate remedy at law. The Superior Court sustained the demurrer, and dismissed the bill; and the plaintiff appealed to this court.

HOLMES, J. It is not alleged that the entry by the defendant for the purpose of removing its own property will do the plaintiff any harm beyond a purely technical trespass, nor that the defendant is not able to pay the plaintiff any damages which she may recover, nor that the plaintiff cannot prevent the trouble by removing the bricks from her land. She has no right to appropriate them because they were not removed within the time allowed at the sale.

Decree affirmed.[1]

[1] In the following cases an injunction against a threatened trespass of a temporary nature was denied, although the right of the plaintiff was not disputed.

Council Bluffs *v.* Stuart, 51 Iowa, 385 (putting ice into plaintiff's empty houses for temporary needs of defendant's business); Heaney *v.* Butte Co., 10 Mont. 590 (cutting off all the trees on plaintiff's land, trees being valuable as fuel in burning limestone — see com-

M. WILLIAMS *v.* THE NEW YORK CENTRAL RAILROAD CO.

COURT OF APPEALS, SEPTEMBER, 1857.

[16 *New York Reports*, 97.]

SELDEN, J.[1] This is a suit in equity, the object of which is to obtain a perpetual injunction, restraining the defendants from continuing to use and occupy with their railway a portion of a certain highway or street in the village of Syracuse, known as Washington Street, and to recover damages for its past occupation. Washington Street was gratuitously dedicated to the use of the public by the plaintiff and others through whose land it was laid; and the Utica and Syracuse Railroad Company, to the rights and liabilities of which the defendants have succeeded, constructed their railway upon it without making any compensation to the plaintiff, and without his consent. At the time the track was laid the plaintiff was the owner of a large number of lots fronting upon the street, a portion of which he has since sold, with a reservation of his claim against the railroad company for damages, and a portion of which he still owns. The damages which have accrued, both upon the sold and unsold portions of the premises, are claimed in this suit.

It is conceded that, by the dedication, the public acquired no more than the ordinary easement or right to use the premises as a highway; and that the plaintiff continues the owner in fee, in respect to the unsold lots, to the centre of the street, subject only to this easement.

I concur with the learned chief justice, and have no hesitation in coming to the conclusion that the dedication of land to the use of the public as a highway is not a dedication of it to the use of a railroad company; that the two uses are essentially different; and that, consequently, a railway cannot be built upon a highway without compensation to the owners of the fee.

It follows that the defendants, in constructing their road upon Washington Street without the consent of the plaintiff, and without any appraisal of his damages or compensation to him in any form, were

ments on this case in Lee *v.* Watson, 15 Mont. 228); Worthington *v.* Moore, 53 N. J. Eq. 46 (entry to remove certain personal property).

In the following cases, although the plaintiff's title was not disputed and the trespass of the defendant would produce a permanent invasion of the plaintiff's right, the court refused to issue an injunction because the pecuniary damage to the plaintiff was small.

McCullough *v.* Denver, 39 Fed. R. 307 (laying of a ditch across plaintiff's property); Nicodemus *v.* Nicodemus, 41 Md. 529 (erection of a culvert over a mill-race); Thorn *v.* Sweeney, 12 Nev. 251, 13 Nev. 415 (construction of a ditch across rocky barren land of the plaintiff); Hoy *v.* Sweetman, 19 Nev. 376 (same as preceding case); Fisher *v.* Carpenter, 67 N. H. 569 (building a roadway across a few feet of plaintiff's land); McGregor *v.* Silver King Co., 14 Utah, 47, 53 (*semble* — construction of ditch across barren land); Crescent Co. *v.* Silver King Co., 17 Utah, 444 (same as preceding case). — ED.

[1] Only so much of the opinion is given as relates to the right to an injunction. — ED.

guilty of an unwarrantable intrusion and trespass upon his property, and that he is entitled to relief. Although he had a remedy at law for the trespass, yet, as the trespass was of a continuous nature, he had a right to come into a court of equity, and to invoke its restraining power to prevent a multiplicity of suits, and can of course recover his damages as incidental to this equitable relief. There may be doubt as to his right to recover in this suit the damages upon the lots which have been sold; because, as to those lots, there was no occasion to ask any equitable relief, and to permit the damages to be assessed in this suit, in effect deprives the defendants of the right to have them assessed by a jury. But as this question has not been raised, it is unnecessary to consider it.

The judgment must be reversed, and there must be a new trial, with costs to abide the event.

Judgment reversed and new trial ordered.[1]

[1] Imlay *v.* Union Co., 26 Conn. 249 (steam railroad); Canastota Co. *v.* Newington Co., 69 Conn. 146 (electric railroad); Bond *v.* Pa. Co., 171 Ill. 508 (steam railroad); O'Connell *v.* Chicago Co., 184 Ill. 308 (steam railroad); Davenport *v.* Johnson, 188 Ill. 472 (steam railroad); Cox *v.* Louisville Co., 48 Ind. 178 (steam railroad); Porter *v.* Midland Co., 125 Ind. 476 (*semble*, steam railroad — right to injunction lost by laches); Michan *v.* Sharp, 27 N. Y. 611 (steam railroad); Broistedt *v.* Metrop. Co., 55 N. Y. 220 (steam railroad); Murdock *v.* Prospect Co., 73 N. Y. 579 (steam railroad); Henderson *v.* N. Y. Co., 78 N. Y. 423 (steam railroad); Uline *v.* N. Y. Co., 101 N. Y. 98 (steam railroad); Shepard *v.* Manhattan Co., 117 N. Y. 442 (elevated railroad); Lynch *v.* Metrop. Co., 129 N. Y. 274 (elevated railroad); McGean *v.* Metrop. Co., 133 N. Y. 9 (elevated railroad); Coatsworth *v.* Lehigh Co., 156 N. Y. 451 (steam railroad); Walsh *v.* Brooklyn Elevated Co. (N. Y. Ap. Div. 1902), 74 N. Y. Sup. 1019; Ford *v.* Chicago Co., 14 Wis. 608 (steam railroad); Chicago Co. *v.* Milwaukee Co., 95 Wis. 561 (elevated railroad) *Accord.*

If the defendant has the right to take the plaintiff's land by eminent domain, he will not be enjoined from running a railroad already built if he will undertake to take at once all the required steps of the eminent domain procedure. North British Co. *v.* London Co., 9 L. J. N. S. Ch. 277, 1 Railw. Cas. 653; Jones *v.* Great Western Co., 1 Railw. Cas. 684; Wood *v.* Charing Cross Co., 33 Beav. 290; Armstrong *v.* Waterford Co., 10 Ir. Eq. R. 60; Northern Co. *v.* St. Paul Co., 3 Fed. R. 702, 704 (*semble*); Harrington *v.* St. Paul Co., 17 Minn. 215; Lohman *v.* St. Paul Co., 18 Minn. 174; Myers *v.* Duluth Co., 53 Minn. 335; Campbell *v.* Pt. Pleasant Co., 23 W. Va. 448; Smith *v.* Pt. Pleasant Co., 23 W. Va. 451. In New York the injunction will not issue if the defendant will pay promptly the damages to the plaintiff's land and its value as assessed in the injunction suit. Henderson *v.* N. Y. Central Co., 78 N. Y. 423; Thompson *v.* Manhattan Co., 130 N. Y. 360.

In the preceding cases the main point in controversy was whether the running of a railroad in a street, the fee of which was in the abutting proprietors, was one of the normal uses of the highway, and therefore included in the easement of way for the public.

The equitable doctrine which gives an injunction against the use of property under the right of eminent domain until all the prescribed formalities are complied with, is universally recognized. Agar *v.* Regents Co., Coop. 77; River Dun Co. *v.* North Midland Co., 1 Railw. Cas. 135; Greenhalgh *v.* Manchester Co., 3 My. & Cr. 784 (*semble* — right to injunction lost by laches); Brocklebank *v.* Whitehaven Co., 15 Sim. 632 (*semble*); Cozens *v.* Bognor Co., 1 Ch. Ap. 594; Bonaparte *v.* Camden Co., Baldw. 205, 230; Eidemiller *v.* Wyandotte City, 2 Dill. 377; Northern Co. *v.* St. Paul Co., 3 Fed. R. 702; Northern Co. *v.* Barnesville Co., 4 Fed. R. 298; Jones *v.* Fla. Co., 41 Fed. R. 70; Gammage *v.* Ga. Co., 65 Ala. 614 (*semble* — right to injunction lost by laches); Western Co. *v.* Judkins, 75 Ala. 428 (*semble* — right to injunction lost by laches); Niemeyer *v.* Little Rock Co., 43 Ark. 11; Bensley *v.* Mountain Co., 13 Cal. 306; Curran *v.* Shattuck, 24 Cal. 427; Pensacola Co. *v.* Jackson, 21 Fla. 146 (*semble* — right to injunction lost by laches); Griffin *v.* Augusta Co., 70 Ga. 164 (*semble* — right to injunction lost by laches); Ga. Co. *v.* Archer, 87 Ga. 237; Commissioners *v.* Durham, 43 Ill. 86; Cobb *v.* Ill. Co., 68 Ill. 233; Sidener *v.* Norristown Co., 23 Ind. 623; Midland Co. *v.* Smith, 113 Ind. 233; Lake Erie Co. *v.* Michener, 117 Ind. 465; Midland Co. *v* Smith, 135 Ind. 348 (*semble* — right to injunction lost by laches); Trustees

HODGSON *v.* DUCE.

IN CHANCERY, BEFORE SIR J. STUART, V. C., MAY 23, 1856.

[2 *Jurist, New Series*, 1014.]

THE defendant, with a number of other persons employed by her, had, upon several occasions, since the year 1845, taken forcible possession of certain lands and houses of the plaintiffs in Birmingham and had committed various acts of trespass thereon; and by force of threats and by annoyance to the tenants of the houses had obtained sums of money from them, which the plaintiffs had been obliged to allow in reduction of the rent. In 1852 these acts of trespass and outrage became so frequent that the plaintiffs were forced to employ men to protect the possession of the tenants. The defendant, however, continued his trespasses and several of the tenants gave notice to quit the houses.

The plaintiffs filed this bill to restrain the defendant from further trespasses. The defendant, who appeared *in forma pauperis*, demurred to the bill.[1]

SIR J. STUART, V. C., said that the present bill was framed upon the principle of asking from this court, by way of injunction, that which should be an effectual protection to the plaintiffs in the enjoyment of a legal right. The case coming on upon demurrer, the defendant must be taken to have admitted the facts stated in the bill, including the legal title of the plaintiffs to the premises in respect of which the trespasses in question were committed. It had been suggested that for these trespasses an adequate remedy might be had at law, and that consequently it was beyond the province of a court of equity to interfere. Unquestionably a court of law would award damages in such a case, but damages against whom? The defendant

v. Davenport, 7 Iowa, 213; Horton *v.* Hoyt, 11 Iowa, 496; Richards *v.* Des Moines Co., 18 Iowa, 259; Gibbs *v.* Chicago Co., 39 Iowa, 340; Harness *v.* Chesapeake Co., 1 Md. Ch. 248; Western Co. *v.* Owings, 15 Md. 199; New Central Co. *v.* George's Co., 37 Md. 537; Piedmont Co. *v.* Spelman, 67 Md. 260 (*semble* — right to injunction forfeited by misconduct); Penrice *v.* Wallis, 37 Miss. 172; Williams *v.* New Orleans Co., 60 Miss. 689; Carpenter *v.* Grisham, 59 Mo. 247; Evans *v.* Mo. Co., 64 Mo. 453; Planet Co. *v.* St. Louis Co., 115 Mo. 613 (*semble* — right to injunction lost by laches); Ray *v.* Atchison Co., 4 Neb. 439; Zimmerman *v.* Kearney Co., 33 Neb. 620; Browning *v.* Camden Co., 4 N. J. Eq. 47; Pickert *v.* Ridgefield Co., 25 N. J. Eq. 316 (*semble* — right to injunction lost by laches); Morris Co. *v.* Hudson Co., 25 N. J. Eq. 384; Folley *v.* Passaic, 26 N. J. Eq. 216; Verga *v.* Miller, 45 N. J. Eq. 93 (*semble* — right to injunction forfeited by misconduct); Delaware Co. *v.* Breckenridge, 55 N. J. Eq. 141, 144 (*semble*); Murdock *v.* Prospect Co., 73 N. Y. 579; People *v.* Law, 34 Barb. 494; Moorehead *v.* Little Miami Co., 17 Oh. 340; Goodin *v.* Cincinnati Co., 18 Oh. St. 169 (*semble* — right to injunction lost by laches); Warner *v.* Railroad Co., 39 Oh. St. 70; Gorrill *v.* Toledo Co., 4 Oh. C. C. 398; Jarden *v.* Phila. Co., 3 Whart. 502; Semple *v.* Cleveland Co., 172 Pa. 369; Bird *v.* Railroad Co., 8 Rich. Eq. 46; White *v* Nashville Co., 7 Heisk. 518; Floyd *v.* Turner, 23 Tex. 292; Stacey *v.* Vermont Co., 27 Vt. 39; Kendall *v.* Railroad Co., 55 Vt. 438; Powers *v.* Beers, 12 Wis. 215; Bohlman *v.* Green Bay Co., 30 Wis. 105; Diedrichs *v.* N. W. Co., 33 Wis. 219, 40 Wis. 157; Spencer *v.* W. Va. Co., 23 W. Va. 406. — ED.

[1] The statement of the case is abridged. — ED.

was a pauper, and as against persons in her position such a form of redress would be the merest mockery of justice. It was true that, under a recent act of Parliament,[1] the courts of common law were armed with the power of restraining by injunction the repetition of acts such as those now complained of, but their jurisdiction in this respect was only concurrent with, and by no means in exclusion of the process of, this court, which could, for obvious reasons, be applied in a much more effectual manner. Under all the circumstances of the case, and taking into consideration that the molestation offered by the defendant consisted, not simply in acts of trespass, but had been vexatious and oppressive in no ordinary degree, the demurrer must be overruled, and an injunction granted in accordance with the prayer of the bill.[2]

1 17 & 18 Vict. c. 125, s. 79.

2 Smallman *v.* Onions, 3 Bro. C. C. 621; Nichols *v.* Jones, 19 Fed. R. 855; Hammond *v.* Winchester, 82 Ala. 470; Sullivan *v.* Rabb, 86 Ala. 433; Ellsworth *v.* Hale, 33 Ark. 633; Myers *v.* Hawkins, 67 Ark. 413; Hicks *v.* Compton, 18 Cal. 206; West *v.* Smith, 52 Cal. 322; Paige *v.* Akins, 112 Cal. 401; N. Y. Co. *v.* Scovill, 71 Conn. 136; Moore *v.* Ferrell, 1 Ga. 7; Webb *v.* Hart, 38 Ga. 641; Cottle *v.* Harrold, 72 Ga. 830; Justice *v.* Aikin, 104 Ga. 714; Owens *v.* Crossett, 105 Ill. 354; Stout *v.* Curry, 110 Ind. 514; Gaines *v.* Leslie, 1 Ind. Terr. 446; Cowles *v.* Shaw, 2 Iowa, 496; Ladd *v.* Osborne, 79 Iowa, 93 (*semble*); Webster *v.* Cooke, 23 Kan. 637; Long *v.* Kasebeer, 28 Kan. 226; Musselman *v.* Marquis, 1 Bush, 463; Hillman *v.* Hurley, 82 Ky. 626, 629; Preston *v.* Preston, 85 Ky. 16; Walker *v.* Leslie, 90 Ky. 642, 649; Hamilton *v.* Ely, 4 Gill, 34; Slater *v.* Gunn, 170 Mass. 509; Kern *v.* Field, 68 Minn. 317; Crane *v.* Davis, (Mississippi, 1896) 21 So. R. 17; James *v.* Dixon, 20 Mo. 79, 80; Burgess *v.* Kattleman, 41 Mo. 480, 483; Lockwood *v.* Lunsford, 56 Mo. 68; Boeckler *v.* Mo. Co., 10 Mo. Ap. 448, 454; Taylor *v.* Todd, 48 Mo. Ap. 550, 556; Graham *v.* Wormack, 82 Mo. Ap. 618; Heaney *v.* Butte Co., 10 Mont. 590, 594; Lea *v.* Watson, 15 Mont. 228; Winnipissiogee Co. *v.* Worster, 29 N. H. 433; Amoskeag Co. *v.* Shirley, 69 N. H. 269; Kerlin *v.* West, 4 N. J. Eq. 449, 453; Piper *v.* Piper, 38 N. J. Eq. 81; Wilson *v.* Hill, 46 N. J. Eq. 367; Boyden *v.* Bragan, 53 N. J. Eq. 26, 27; Speare *v.* Cutter, 5 Barb. 486, 4 How. Pr. 175, s. c.; Mulry *v.* Norton, 100 N. Y. 424; Lloyd *v.* Heath, Busb. Eq. 39; Dunkart *v.* Rinehart, 87 N. Ca. 224; McKay *v.* Chapin, 120 N. Ca. 159; Ross *v.* Page, 6 Oh. 166, 167; Lembeck *v.* Nye, 47 Oh. St. 336, 354; Echert *v.* Ferst, 10 Phila. 514; McGregor *v.* Mining Co., 14 Utah, 47 (*semble*); Cresap *v.* Kemble, 26 W. Va. 603 (*semble*); Hanly *v.* Watterson, 39 W. Va. 214 *Accord.*

Sills *v.* Goodyear, 80 Mo. Ap. 128 *Contra.*

If the plaintiff may properly and adequately protect himself by the use of force to keep out an intruder, who is doing no substantial damage beyond his wrongful intrusion, the latter's insolvency will not warrant an injunction against him Mechanics Foundry *v.* Ryall, 75 Cal. 601; Centreville Co. *v.* Barnett, 2 Ind. 536. See, also, Morgan *v.* Palmer, 48 N. H. 336, in which insolvency was thought to be immaterial, the damage being inconsiderable, and the real controversy being as to the title.

Similarly, the insolvency of a defendant in possession, who is merely cultivating the land as a squatter, will not justify a mandatory injunction. The plaintiff can recover possession by the ordinary common law remedy. Warlier *v.* Williams, 53 Neb. 143.

Non-residence of the defendant. Injunction against a trespass has been granted because the defendant resided without the jurisdiction. Miller *v.* Wills, 95 Va. 337. — Ed.

LONDON, ETC., RAILWAY CO. *v.* LANCASHIRE, ETC., RAILWAY CO.

IN CHANCERY, BEFORE SIR W. P. WOOD, V. C., MAY 2, 1867.

[*Law Reports*, 4 *Equity*, 174.]

THE plaintiffs, in order to enlarge their station at Wigan, purchased a piece of ground lying between the station and a lane called Faggy Lane, and afterwards took down part of their new boundary wall and made an opening into Faggy Lane, which opening was daily and constantly used by persons travelling by the plaintiff's railway and by the plaintiffs and their officers and servants as a means of access to and from the plaintiff's station from and to Faggy Lane.

On the 29th of March, defendants, without lawful authority, erected a strong wooden fence partly upon the plaintiff's land and partly upon part of Faggy Lane, so as completely to block up the communication between plaintiff's station and Faggy Lane. The plaintiffs having removed this barrier, the defendants on the 30th of March built a much stronger fence in the same place. This fence was also removed by the plaintiffs, although opposed by some fifty workmen of the defendants. On the 4th of April the defendants completed the erection of a very strong barrier or stockade eight feet high, and sunk to a considerable depth, made of very thick timber, so as completely to prevent all access between the station and Faggy Lane. The defendants stated that they would keep this entrance to the plaintiff's station stopped up at all hazards.

To the plaintiffs' bill stating these facts and praying an injunction to restrain the defendants from permitting the barrier to remain unremoved, from preventing its removal by the plaintiffs, and from the erection of any fence obstructing the approach to the station, the defendants demurred.[2]

SIR W. PAGE WOOD, V. C. This demurrer must certainly be overruled. It is one of those cases of irreparable mischief occasioned by a trespasser against persons in possession which require relief in equity. Robinson *v.* Lord Byron [3] was just a case of the same char-

[1] In Bidwell *v.* Holden, 63 L. T. Rep. 104, 105, North, J., said: "In a case where the defendant is in a humble position in life, it will be better, I think, to make a positive order that he should do the act which it is intended to compel him to do, rather than to make an order in the negative form restraining him from permitting the fences to remain as they were; there might in the latter case be some danger of misapprehension on the defendant's part."

In Jackson *v.* Normanby Co., 1899, 1 Ch. 438, Lindley, M. R., said: "The registrar has called our attention to the form in which orders of this kind have hitherto been made, namely, restraining the defendant from allowing the buildings to remain on the land; but in future it will be better for the court to say in plain terms what it means, and in direct words to order the buildings to be pulled down and removed." The good sense of these remarks is obvious. The artificial and ingenious rather than ingenuous doctrine of Lord Eldon in Lane *v.* Newdigate, *supra*, 75, may now be regarded as obsolete. — ED.

[2] The statement of the case is condensed, and the argument for the defendants is omitted. — ED.

[3] 1 Bro. C. C. 588.

acter in one sense. In that case, the letting down the water by the miller, so as to inundate his neighbor, was an act which could not be remedied, and the evil of which would be irreparable before the right in question could be tried. What is alleged here is that the plaintiffs, on land of which they have had possession for nearly six years, opened about two years ago a foot passage into this lane for the accommodation and at the request of persons desirous of coming that way to their railway, a convenience to those who wished to use the railway. The operation being described as simply an opening in their wall (which, they say, they completed after the purchase from Lord Kingsdown), I must assume that to be on the very verge or edge of the lane. Then the bill alleges that they are rivals in traffic with defendants; that persons have daily used this footpath as passengers on their railway; and that the obstruction in question by the defendants is for the express purpose of diverting that traffic and inducing persons to travel on defendants' line of railway, whereby the plaintiffs will be irremediably damaged. This, one can easily see, is most likely to take effect, as, if passengers are prevented from using one easy mode of access, which they were daily in the habit of using, the diversion of that traffic will arise, and it is that sort of damage which cannot be measured. There is no mode of estimating it. It is just as if a large shop in Regent Street, having two entrances to its place of business, constantly used, and by which the business had been largely increased (one in Regent Street and the other in a side street), were to find that some one had taken upon himself to close up one of those entrances. It is just one of those cases of trespass and irremediable damage which the court does interfere to prevent. In Hervey *v.* Smith,[1] I felt no hesitation in granting a mandatory injunction where a man had placed a tile upon his neighbor's chimney-pot. It was one of those simple and summary acts which can be so immediately done, that it is not possible to prevent it while the right is being tried, and I decided that the court would interfere to prevent such damage. In this case it is impossible to say what amount of traffic will be lost while the right is being tried. It is not in the least analogous to the cases cited, in which the court has refused to interfere against the legal title of the person in possession, who was about to cut down trees, or exercise similar acts of ownership.

Here there is no averment on the face of the bill that the defendants claim any right in the property. They place this obstruction partly on the plaintiffs' property and partly on the lane. I agree that, so far as the public lane is concerned, it does not appear that there is any obstruction to those persons going along the lane who do not want to come upon the plaintiff's property. But the allegation is that partly on the plaintiff's property, and partly on the lane, defendants have made a wall which is an obstruction. That is a case, I think, for relief, and the demurrer must be overruled.[2]

[1] 1 K. & J. 389.

[2] Mandatory injunctions against a trespasser were granted in the following cases: Her-

W. A. WHEELOCK, Respondent, *v.* M. NOONAN, Appellant.

Court of Appeals, New York, January 17, 1888.

[108 *New York Reports*, 179.]

This action was brought to compel defendant to remove from certain lots belonging to plaintiff, situate in the city of New York, a quantity of rocks or boulders placed thereon by defendant.

Finch, J.[1] The findings of the trial court establish that the defendant, who was a total stranger to the plaintiff, obtained from the latter a license to place upon his unoccupied lots in the upper part of the city of New York a few rocks for a short time, the indefiniteness of the period having been rendered definite by the defendant's assurance that he would remove them in the spring. Nothing was paid or asked for this permission, and it was not a contract in any just sense of the term, but merely a license which by its terms expired in the next spring. During the winter, and in the absence and without the knowledge of plaintiff, the defendant covered six of the lots of plaintiff with "huge quantities of rock," some of them ten or fifteen feet long, and piled to the height of fourteen to eighteen feet. This conduct was a clear abuse of the license and in excess of its terms, and so much so that if permission had been sought upon a truthful statement of the intention it would undoubtedly have been refused. In the spring the plaintiff, discovering the abuse of his permission, complained bitterly of defendant's conduct and ordered him to remove the rocks to some other locality. The defendant promised to do so but did not, and in the face of repeated demands has neglected and omitted to remove the rocks from the land.

It is now said that the remedy was at law; that the owner could have removed the stone and then recovered of the defendant for the expense incurred. But to what locality could the owner remove them? He could not put them in the street; the defendant presumably had no vacant lands of his own on which to throw the burden; and it would follow that the owner would be obliged to hire some vacant lot or place of deposit, become responsible for the rent, and advance the cost of men and machinery to effect the removal. If any adjudication can be found throwing such burden upon the owner, compelling him to do in advance for the trespasser what the latter is bound to do, I should very much doubt its authority. On the con-

vey *v.* Smith, 1 K. & J. 389 (to remove tiles from tops of chimneys); Bidwell *v.* Holden, 63 L. T. Rep. 104 (restoration of ditch, bank, and fence); Baron *v.* Korn, 127 N. Y. 224 (removal of encroaching foundation wall); Eno *v.* Christ, 25 N. Y. Misc. Rep. 24 (removal of earth dumped upon plaintiff's lots); Norton *v.* Elwert, 29 Oreg. 583 (removal of encroaching house wall); Stewart's Ap., 56 Pa. 413 (removal of railroad track and embankments); Pile *v.* Pedrick, 167 Pa. 298 (removal of party wall) *Accord*.

In Boyden *v.* Bragan, 53 N. J. Eq. 26, the court declined to compel the defendant to remove a monument wrongfully erected by him on the plaintiff's land. — Ed.

[1] Only a portion of the opinion of the court is given. — Ed.

trary the law is the other way. Beach *v.* Crane.[1] And all the cases which give to the injured party successive actions for the continuance of the wrong are inconsistent with the idea that the injured party must once for all remove it. Such is neither an adequate remedy nor one which the plaintiff was bound to adopt.

But it is further said that he could sue at law for the trespass. That is undoubtedly true. The case of Uline *v.* New York Central and Hudson River Railroad Company[2] demonstrates upon abundant authority that in such action only the damages to its date could be recovered, and for the subsequent continuance of the trespass new actions following on in succession would have to be maintained. But in a case like the present would that be an adequate remedy? In each action the damages could not easily be anything more than the fair rental value of the lot. It is difficult to see what other damages could be allowed, not because they would not exist, but because they would be quite uncertain in amount and possibly somewhat speculative in their character. The defendant, therefore, might pay those damages and continue his occupation, and, if there were no other adequate remedy, defiantly continue such occupation and, in spite of his wrong, make of himself, in effect, a tenant who could not be dispossessed. The wrong in every such case is a continued unlawful occupation, and any remedy which does not or may not end it is not adequate to redress the injury, or restore the injured party to his rights. On the other hand, such remedy in a case like the present might result to the wrong-doer in something nearly akin to persecution. He is liable to be sued every day, *die de diem*, for the renewed damages flowing from the continuance of the trespass; and while ordinarily there is no sympathy to be wasted on a trespasser, yet such multiplicity of suits should be avoided, and especially under circumstances like those before us. The rocks could not be immediately removed. The court have observed that peculiarity of the case and shaped their judgment to give time. It may take a long time, and during the whole of it the defendant would be liable to daily actions.

For reasons of this character it has very often been held that while ordinarily courts of equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances, and have often done so where the trespass was a continuing one, and a multiplicity of suits at law was involved in the legal remedy. The doctrine was recognized and the authorities cited in the Murdock Case,[3] and the rule deemed perfectly settled.

That case, and those referred to, it is true, were cases of intrusion, where no consent had been given for the entry of the intruder; but whether the trespass was such from the beginning, or became one after a revocation of the license, can make no difference as it respects the adequacy of the legal remedy. That is the same in either event. Two cases of the former character were cited in the Uline Case.

[1] 2 N. Y. 86, 97.
[2] 101 N. Y. 98.
[3] 73 N. Y. 579.

Bowyer *v.* Cook,[1] Holmes *v.* Wilson.[2] In one, stumps and stakes had been left on plaintiff's land and in the other buttresses to support a road; in each an action of trespass had been brought and damages recovered and paid; and in each, after a new notice to remove the obstruction, a further action of trespass was brought and sustained. So that, as I have said, the legal remedy is identical, however the trespass originated.

It is a general rule that a court of equity will act in such cases only after the plaintiff's right has been established at law, but that rule has its exceptions. T. & B. R. R. Co. *v.* B. & H. T. R. R. Co.[3] Where the facts are in doubt, and the right not clear, such undoubtedly would be a just basis of decision, though the modern system of trying equity cases makes the rule less important. Where, as in an intrusion by railroad companies whose occupation threatens to be continuous the injury partakes of that character, an action at law to establish the right has not been required. Indeed, I am inclined to deem it more a rule of discretion than of jurisdiction.

In Avery *v.* New York Central and Hudson River Railroad Company,[4] to which we have been referred since the argument, we were disposed to sustain a mandatory injunction requiring defendant to remove so much of a fence as obstructed plaintiff's right of way, although the obstruction was not a nuisance but an invasion of a private right. In that case the equitable remedy was not challenged by either counsel or the court, and evidently stood upon the grounds here invoked; those of a continuing trespass the remedy for which at law would be inadequate, and involve repeated actions by the injured party for damages daily occurring.

These views of the case enable us to support the judgment rendered. It should be affirmed, with costs.

All concur, except RUGER, Ch. J., not voting.

Judgment affirmed.

HUNTER *v.* CARROLL.

SUPREME COURT, NEW HAMPSHIRE, JUNE, 1888.

[64 *New Hampshire Reports*, 572.]

BILL in equity, praying that the line between land of the plaintiff and defendant be established, and that the defendant be ordered to remove two houses which are situated partly upon the plaintiff's land. Facts found by a referee.

The defendant has two houses which extend over the line, — the northerly one at its northwest corner seven and forty-five hundredths feet; the southerly one at its southwest corner four and ninety-five hundredths feet. The defendant purchased the land for the purpose

[1] 4 M. G. & S. 236. [2] 10 A. & E. 503. [3] 86 N. Y. 128. [4] 106 N. Y. 142.

of putting the south building upon it, and acted innocently and with no intent to trespass upon the plaintiff in putting it there, supposing it was on her own land. The plaintiff knew the building was being put on the lot by the defendant, and made no objection, not knowing where the line was. A strip of land west of the defendant's buildings, ten feet wide, which would include that part of the plaintiff's land on which the defendant's buildings now stand, is worth ten dollars. The location of the line has been heretofore established in a suit at law between the parties.

The court entered a decree, in substance, that if the plaintiff files with the clerk, before June 1, 1888, a deed of quitclaim or release to the defendant of a strip of land ten feet in width across the easterly end of her lot and adjoining the defendant's land, judgment is to be entered on the report for the plaintiff for fifteen dollars damages and taxable costs. If the plaintiff refuses to make such conveyance, the bill is to be dismissed with costs for the defendant. To this order and decree the plaintiff excepted.

BLODGETT, J. The plaintiff can take nothing by her exception. The inconsequential injury reported by the referee may apparently be fully compensated, and the land itself recovered in proceedings at law; but if not, the manifest object of this proceeding being to compel the defendant to pay an exorbitant price for the narrow strip of land upon which, through mutual mistake, her two houses are partly situate, and which is comparatively valueless except for purposes of litigation, or subject her to great inconvenience and expense in removing the buildings, equity will not aid in this attempted act of oppression, and will not take jurisdiction to give the plaintiff redress other than that afforded her by the alternative decree made at the trial term. See Wason *v.* Sanborn, 45 N. H. 169; Clark *v.* Society, 46 N. H. 272, 275, 276; Bassett *v.* Company, 47 N. H. 426, 439, 441, 443. *Exception overruled.*[1]

[1] A mandatory injunction was refused in the following cases: Mayfair Co. *v.* Johnston, 1894, 1 Ch. 508 (removal of foundation-wall — but land was in possession of tenant of plaintiff who was no party to the suit); Lynch *v.* Union Inst., 159 Mass. 306, modifying effect of s. c. 150 Mass. 394 (removal of a vault enclosed in masonry. Plaintiff was a lessee whose term would expire in eighteen months; the defendant built the vault believing plaintiff's claim to be invalid. The damage to the plaintiff was small, the cost of removal and the inconvenience to the defendant would be great); Boyden *v.* Bragan, 53 N. J. Eq. 26 (removal of a monument wrongfully erected on plaintiff's land).

In Lynch *v.* Union Inst., *supra*, Knowlton, J., said, p. 308: "In general, where a defendant has gone on without right and without excuse in an attempt to appropriate the plaintiff's property, or to interfere with his rights, and has changed the condition of his real estate, he is compelled to undo, so far as possible, what he has wrongfully done affecting the plaintiff, and to pay the damages. In such a case the plaintiff is not compelled to part with his property at a valuation, even though it would be much cheaper for the defendant to pay the damages in money than to restore the property. . . . One who has gone on wrongfully in a wilful invasion of the plaintiff's right in real estate has no equity to set up against the plaintiff's claim to have his property restored to him as it was before the wrong was done. . . .

"On the other hand, where, by an innocent mistake, erections have been placed a little upon the plaintiff's land, and the damage caused to the defendant by removal of them would be greatly disproportionate to the injury of which the plaintiff complains, the court will not order their removal, but will leave the plaintiff to his remedy at law. Hunter *v.* Carroll." See, to the same effect, Harrington *v.* McCarthy, 169 Mass. 492. — ED.

WATSON *v.* SUTHERLAND.

Supreme Court, United States, December, 1866.

[5 *Wallace*, 74.]

Appeal from the Circuit Court of the United States for the District of Maryland; the case being this: —

Watson & Co., appellants in the suit, having issued writs of *fieri facias* on certain judgments which they had recovered in the Circuit Court for the District of Maryland against Wroth & Fullerton, caused them to be levied on the entire stock in trade of a retail dry goods store in Baltimore, in the possession of one Sutherland, the appellee. Sutherland, claiming the exclusive ownership of the property, and insisting that Wroth & Fullerton had no interest whatever in it, filed a bill in equity, to enjoin the further prosecution of these writs of *fieri facias*, and so to prevent, as he alleged, irreparable injury to himself. The grounds on which the bill of Sutherland charged that the injury would be irreparable, and could not be compensated in damages, were these: that he was the *bonâ fide* owner of the stock of goods, which were valuable and purchased for the business of the current season, and not all paid for; that his only means of payment were through his sales; that he was a young man, recently engaged on his own account in merchandising, and had succeeded in establishing a profitable trade, and if his store was closed, or goods taken from him, or their sale even long delayed, he would not only be rendered insolvent, but his credit destroyed, his business wholly broken up, and his prospects in life blasted.

On the filing of the bill a temporary injunction was granted, and when the cause was finally heard, after a general replication filed and proof taken, it was made perpetual.

These proofs, as both this court and the one below considered, hardly established, as respected Sutherland, the alleged fraud on creditors.

The appeal was from the decree of perpetual injunction.[1]

Davis, J. There are, in this record, two questions for consideration. Was Sutherland entitled to invoke the interposition of a court of equity; and if so, did the evidence warrant the court below in perpetuating the injunction?

It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief, "but it is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity."[2] How could Sutherland be com-

[1] The statement of the case is abridged, and the arguments of counsel as well as a part of the opinion of the court are omitted. — Ed.

[2] Boyce's Exrs. *v.* Grundy, 3 Peters, 210.

pensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated?

If the appellants made the levy, and prosecuted it in good faith, without circumstances of aggravation, in the honest belief that Wroth & Fullerton owned the stock of goods (which they swear to in their answer), and it should turn out, in an action at law instituted by Sutherland for the trespass, that the merchandise belonged exclusively to him, it is well settled that the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial.[1]

And this is an equal rule, whether the suit is against the marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judicially investigated and settled. "Legal compensation refers solely to the injury done *to the property taken*, and not to any collateral or consequential damages, *resulting to the owner*, by the trespass."[2] Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law.

Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in, arrests the proceedings *in limine;* brings the parties before it; hears their allegations and proofs, and decrees, either that the proceedings shall be unrestrained, or else perpetually enjoined. The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case must depend altogether upon the character of the case as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued.

The decree of the Circuit Court is, therefore,

Affirmed.[3]

[1] Conard *v.* Pacific Ins. Co., 6 Peters, 272, 282.

[2] Pacific Ins. Co. *v.* Conard, 1 Baldwin, 142.

[3] North *v.* Peters, 138 U. S. 271; McCreery *v.* Sutherland, 23 Md. 471 (distinguishing Lewis *v.* Levy, 16 Md. 85 and Freeland *v.* Reynolds, 16 Md. 416, in which cases the plaintiff was simply a mortgagee of goods in a store); Low *v.* Holmes, 17 N. J. Eq. 148; Sickel *v.* Coombs, 10 N. Y. Misc. Rep. 549; Walker *v.* Hunt, 2 W. Va. 491 *Accord.*

An injunction will be issued, in most jurisdictions, against the sale of partnership goods on an execution in favor of a separate creditor of one of the partners. Ames, Cas. on Part. 297 n. 1. A *cestui que* trust of a chattel may have an injunction against its sale on execution against the trustee, for the obvious reason that there would be no remedy at law against any one connected with the execution sale. Trueblood *v.* Hollingsworth, 48 Ind. 537, 59 Ind. 542; Allen *v.* Winstandly, 135 Ind. 105, 108 (*semble*); Smith *v.* Smith, 4 Jones, Eq. 303; Scheferling *v.* Huffman, 4 Oh. St. 241.

Injunction against seizure of chattel of peculiar quality and value. — In the following cases an injunction was issued against the asportation of a chattel of peculiar value: Huntington

v. Bell, 2 Port. (Ala.) 51 (slave); Sanders *v.* Sanders, 20 Ark. 610 (slave — overruling Lovette *v.* Longmire, 14 Ark. 40); Stilwell *v.* Oliver, 35 Ark. 184, 188 (*semble* — slave); Poincy *v.* Burke, 28 La. An. 673 (a painting); Dunn *v.* Vail, 7 Mart. La. 416, 436 (slave); Sevier *v.* Ross, Freem. Ch. 519; Beatty *v.* Smith, 10 Miss. 567, 570 (slave); Cooper *v.* Newell, 36 Miss. 316 (slave); Hammond *v.* St. John, 4 Yerg. 107, 111 (*semble* — slave); Henderson *v.* Vaulx, 10 Yerg. 30 (slave); Randolph *v.* Randolph, 6 Rand. 194 (slave); Sims *v.* Harrison, 4 Leigh, 346 (slave); Kelly *v.* Scott, 5 Gratt. 479 (slave); Walker *v.* Hunt, 2 W. Va. 491, 494 (*semble* — slave).

But this doctrine has been denied, as to slaves in two states: Nesmieth *v.* Bowler, 3 Bibb, 487 (slave); Kendrick *v.* Arnold, 4 Bibb, 235; Watkins *v.* Logan, 3 T. B. Mon. 20; Hall *v.* Davis, 5 J. J. Marsh. 290; Young *v.* Young, 9 B. Mon. 66; Howell *v.* Howell, 5 Ired. Eq. 258; Du Pre *v.* Williams, 5 Jones, Eq. 96 (observe the surprising distinction taken by that learned lawyer, Pearson, C. J., who would allow specific performance of a contract for a slave, while denying an injunction against the asportation of a slave); see also Amis *v.* Myers, 16 How. 492.

Miscellaneous cases of injunction against asportation of chattels. — Ford *v.* Rigby, 10 Cal. 449 (against sale under execution against lessor of chattel, because plaintiff had no immediate right of possession); Denny *v.* Denny, 113 Ind. 22 (against sale by executor of corn, selected by widow as part of her allowance and needed for support of her animals); Martin *v.* Jewell, 37 Md. 520 (mortgagee of growing crop restrained its sale on execution against mortgagor, because of probable loss if it were not harvested by mortgagor); Blondell *v.* Consol Co., 89 Md. 732 (against tampering with plaintiff's gas meters); Cooper *v.* Newell, 36 Miss. 316 (to prevent forfeiture of bond given by defendant in replevin); Warren Mills *v.* New Orleans Co., 65 Miss. 391 (against conversion of numerous but scattered seed bags of plaintiff to serious damage of his business); Electric Co. *v.* Heffernan, 34 N. Y. St. Rep. 436 (against removal of telephone poles); Wood *v.* Stanberry, 21 Oh. St. 142 (only means of protecting a second judgment creditor against the really invalid claim of first judgment creditor).

Injunction against threatened trespass by an insolvent. — Because of the inadequacy of the legal remedy an insolvent person will be restrained from carrying off or converting another's chattel: Cruickshank *v.* Bidwell, 176 U. S. 73, 81 (*semble*); Rohrer *v.* Babcock, 114 Cal. 124; Hitt *v.* Ehrlich, 89 Ga. 824; Kaufman *v.* Wiener, 169 Ill. 596; Milan Mills *v.* Hickey, 59 N. H. 241; Lloyd *v.* Heath, Busb. Eq. 39; Du Pre *v.* Williams, 5 Jones, Eq. 96 (*semble*); Bristol *v.* Hallyburton, 93 N. Ca. 384, 386 (*semble*).

No Injunction against Meddling with Chattels. — Equity will not as a rule restrain the sale of A.'s chattels on an execution against B. J. Garstin *v.* Asplin, 1 Madd. 150; Stilwell *v.* Oliver, 35 Ark. 184; Markley *v.* Rand, 12 Cal. 275; Johnson *v.* Conn. Bank, 21 Conn. 148; Henderson *v.* Bates, 3 Blackf. 460; Allen *v.* Winstandly, 135 Ind. 105; Mo. Co. *v.* Wheaton, 7 Kan. 232; Nesmieth *v.* Bowler, 3 Bibb, 487; Kendrick *v.* Arnold, 4 Bibb, 235; Watkins *v.* Logan, 3 T. B. Mon. 20; Bouldin *v.* Alexander, 7 T. B. Mon. 424; Hall *v.* Davis, 5 J. J. Marsh. 390; Young *v.* Young, 9 B. Mon. 66; Frazier *v.* White, 49 Md. 1; Beatty *v.* Smith, 10 Miss. 567; Bailey *v.* Wade, 24 Mo. Ap. 186; Warner *v.* Paine, 3 Barb. Ch. 630; Newcombe *v.* Irving Bank, 51 Hun, 220, 221; Du Pre *v.* Williams, 5 Jones, Eq. 96; Hammond *v.* St. John, 4 Yerg. 107; Perrin *v.* Stevens, (Tex. Civ. Ap. 1895) 29 S. W. R. 927; Bowyer *v.* Creigh, 3 Rand. 25; Kuhn *v.* Mack, 4 W. Va. 186; Dunn *v.* Baxter, 30 W. Va. 672; Baker *v.* Rinehard, 11 W. Va. 238; White *v.* Snyder, 24 W. Va. 615 (explaining Lewis *v.* Spencer, 7 W. Va. 689). Nor will equity restrain an asportation or conversion of a chattel in any other mode. Mason *v.* Norris, 18 Grant, Ch. 500; Burnett *v.* Craig, 30 Ala. 135 (*semble* — no injunction against arrest of person); Blood *v.* Blood, 110 Mass. 547 (*semble*); Burgess *v.* Kattleman, 41 Mo. 480; Hart *v.* Mayor, 3 Paige, 213; Mayor *v.* Conover, 5 Abb. Pr. 171. — Ed.

SECTION III.

Disturbance of Easements.

THE ATTORNEY-GENERAL *v.* NICHOL.

BEFORE LORD ELDON, C., NOVEMBER 9, 1809.

[16 *Vesey*, 338.]

THE object of this information, filed at the relation of the Scottish Hospital, was to restrain the defendant from building up a certain wall, erection, or building, above the height of sixteen feet, and thereby obscuring and darkening the ancient lights of the Scottish Hospital.

An injunction was obtained on the 15th of July, without notice, upon affidavit and certificate of the information filed. The hospital is situated in Crane Court, Fleet Street; where the defendant occupies some adjoining premises, for the purpose of carrying on his business as a printer; the wall, which was the subject of complaint, being not opposite but at right angles with the hospital. The affidavits represented that the relators gave notice to the defendant not to raise the wall higher than sixteen feet; that notwithstanding that notice he proceeded and had carried it up to twenty feet; that the ancient windows of the hospital are by this wall darkened and obscured; and if it should be carried higher, they will be to a greater degree darkened and obscured; and so much as materially to affect the value of the premises. The relators had brought an action.

The writ of injunction was dated the 22d of July, and was served on the defendant on the 1st of September following, but the defendant was never served with any writ of subpœna to appear and answer the information.

Sir Samuel Romilly, at the second seal before the term, moved, upon notice, that the information might be dismissed, and the injunction dissolved, on the ground, that no subpœna had been served.

THE LORD CHANCELLOR appeared to think that the subpœna ought to have been served; but refused to dissolve the injunction; as in this case the party was misled as to the practice, and in fact the practice seemed to have been both ways.

The motion for dissolving the injunction accordingly proceeded upon the merits.[1]

[1] The plaintiff's objection to the defendant being heard on the merits on affidavit, or until he put in his answer, was overruled by Lord Eldon, "as the relators, not having served the subpœna, should be considered as having waived their right to an answer." So much of the report as relates to this point is omitted, together with the arguments of counsel upon the merits. — ED.

1730. Fitz. Gibbs. ct decld + qr Inch. injuncn
bes at ⁿ stes at hd.

THE LORD CHANCELLOR. With regard to the jurisdiction of this court many of the circumstances, that have been pressed in the argument, lay no foundation for it. Cases may exist, upon which this court could not interfere, yet an action upon the case might be very well maintained. The wall between a man and his neighbor may belong to the one, both in respect of property and the obligation to repair, and yet the other might support an action on the case for making a window in it, or for raising the wall; but the consequence does not follow that a court of equity has any jurisdiction.[1] The

[1] "It is not in every case in which an action can be maintained for the obstruction of ancient lights that an injunction will be granted by a court of equity.

"Something more is required than that amount of injury for which damages may be recovered at law. As observed by Lord Eldon, this court will not interpose upon every degree of darkening ancient lights and windows; but the standard of the amount of damage that calls for the exercise of the jurisdiction to grant preventive relief or to prohibit the continuance of the nuisance has not been defined with any certainty." Per Lord Westbury in Jackson *v.* Duke of Newcastle, 3 D. J. & S. 275, 283.

"First of all, it is necessary to ascertain what it is that will at law support a claim for damages in respect of an injury done to a building by the obstruction of light and air; and the authority to which I would refer, in preference to any other upon this subject, is the summing-up of Chief Justice Best in the case of Back *v.* Stacey, 2 C. & P. 466, because that summing-up has been approved of by the lords justices in a recent case before their lordships. The chief justice told the jury: 'In order to give a right of action, and sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done.' With the single exception of reading *or* for *and*, I apprehend that the above statement correctly lays down the doctrine in the manner in which it would now be supported in an action at law. . . .

"Having arrived at this conclusion with regard to the remedy which would exist at law, we are met with the further difficulty, that in equity we must not always give relief (it was so laid down by Lord Eldon and by Lord Westbury) where there would be relief given at law. Having considered it in every possible way, I cannot myself arrive at any other conclusion than this: that where substantial damages would be given at law, as distinguished from some small sum of £5, £10, or £20, this court will interpose; and on this ground, that it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbor have a right to purchase him out without any Act of Parliament for that purpose having been obtained. It appears to me it cannot safely be held that this court will allow parties so to exercise the rights which they may have in their soil as to inflict an injury on their neighbor, if the neighbor is unwilling to take any compensation; or even though he be willing to take compensation, if he is not ready to submit to the valuation of a jury, but insists on his own right to determine what the value of his property is. . . .

"I may suggest a case in which the court would probably not interfere (not merely when the right is of short duration, for I have interfered in cases of very short duration with reference to the obstruction of light), but where the whole of the property is about to cease immediately — as, for instance, in the case of notice given under a Railway Act to take a house, when the house is about to be destroyed and razed to the ground in two or three days' time. That is one of the cases in which damages might be given at law, and yet this court would not think it right to interfere." *Per* Sir W. Page Wood, V. C., in Dent *v.* Auction Mart Co., L. R., 2 Eq. 238, 245-247.

"It is scarcely necessary to say that this court would certainly not interfere by way of injunction in a case in which no damages could be recovered at law. Perhaps it may be said that this court would not so interfere in a case in which, although damages might be recoverable at law, the amount to be recovered would be trifling and inconsiderable; but as this is a question on which, as applying to cases of nuisance, there has not been a unanimity of opinion in the court, I leave that point untouched." *Per* Turner, L. J., in Johnson *v.* Wyatt, 33 L. J. Ch. 394, 397.

"Practically, in my opinion there is no difference with respect to light in the amount of damage which would entitle a person to maintain an action at law and that which would

foundation of this jurisdiction, interfering by injunction, is that head of mischief, alluded to by Lord Hardwicke,[1] that sort of material injury to the comfort of the existence of those who dwell in the neighboring house, requiring the application of a power to prevent, as well as remedy, an evil, for which damages more or less would be given in an action at law. The position of the building, whether opposite, at right angles, or oblique, is not material. The question is, whether the effect is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences, which upon equitable principles should be not only compensated by damages, but prevented by injunction. Assuming, therefore, that from circumstances of enjoyment, usage, or interest, some contract could be implied, that this defendant should not build upon the premises he occupies, to the east of the hospital, and that an action on the case could be maintained upon that ground, that would not induce this court to interpose by injunction; unless the consequences of the act, which may be represented as illegal, being a violation of contract, express or implied, appeared to be such as should be, not merely redressed, but prevented by application of the peculiar means of this court.

I repeat the observation of Lord Hardwicke, that a diminution of the value of the premises is not a ground; and there is as little doubt, that this court will not interpose upon every degree of darkening ancient lights and windows. There are many obvious cases of new buildings, darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an action upon the case; which, however, might be maintained in many cases, which

entitle him to file a bill in equity. The circumstance that all cases of loss of light and air are brought to this court, seems tolerably good evidence that the world at large does not consider that a plaintiff has practically a better chance of succeeding if he has the right to light tried before a judge and jury than he has if he carries to this court. I am most unwilling to make a difference between law and equity when I do not find it exist." *Per* Mellish, L. J., in Leech *v.* Schweder, 9 Ch. 463, 476.

"It must not be forgotten that whatever observations fell from Lord Eldon in the case of Attorney-General *v.* Nichol, or from Lord Westbury in Jackson *v.* Duke of Newcastle, the settled law is now as laid down in Back *v.* Stacey, with the slight alteration (as the Vice-Chancellor Wood points out) of the single word 'or' for 'and.' With that alteration the law stands thus: 'In order to give a right of action, and sustain the issue, there must be a substantial privation of light sufficient to render the occupation of the house uncomfortable or to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done.' That is necessary in order to get damages at law. Whether it was always so I am by no means sure. If that is necessary to get damages at law, those are the very circumstances which entitle the plaintiff to an injunction in equity, subject to this, that the damages must be substantial, though one can hardly conceive a case in which, if the doctrine of Back *v.* Stacey is well founded (and I believe it is), the tenant in possession would not get substantial damages. The only case in which I conceive there would be damages not substantial would be the case of a reversioner who would not sustain any immediate damage, and who might bring an action to try the right." *Per* Sir G. Jessel, M. R., in Aynsley *v.* Glover, 18 Eq. 544, 552.

"If the court finds the damage slight, such, for instance, as might be covered by 5*l.* or 6*l.*, it may order damages instead of an injunction; but I agree, if the damage is substantial and extensive, the plaintiff is entitled to insist on an injunction." *Per* Romer, L. J., 1902, 1 Ch. 302, 306. See also Wilson *v.* Cohen, Rice, Eq. 80, 84. — ED.

[1] 1 Dick. 164.

would not support an injunction. These affidavits, therefore, stating only that the ancient lights will be darkened, but not that they will be darkened in a sufficient degree for this purpose, will not do. Farther, the affidavits and the information regard only the case of a perpendicular building, with a wall twenty feet high, which might have an effect so injurious, that it would be restrained; though a lower elevation, with a sloping roof, would let in so much light, that the interposition of this court would not be justified, and upon the proposal, now made, limiting the wall to sixteen feet, I have no rule for determining to what elevation under twenty feet it may be carried without any injurious effect. Considering also the particular circumstances in which the defendant is represented as standing with reference to his business, and that they have got so near a decision, which I should be very unwilling by my interference to retard, I will dissolve this injunction; the defendant undertaking, if upon the trial, promptly had, the verdict shall be against him, to remove such building as shall be proved in a material and improper degree affecting these ancient lights.

The defendant gave the undertaking accordingly.

MARTIN *v.* PRICE.

Court of Appeal, December 19, 1893.

[*Law Reports*, (1893) 1 *Chancery*, 276.]

The plaintiff in this action was the lessee of a house in Temple Street, Birmingham, under a lease of which about twenty-nine years were unexpired. He did not occupy the house himself, but had sublet it to various persons. Part was an hotel held on a sublease which would expire in 1901. Part was let to an auctioneer and estate agent, on a lease which would expire in December, 1894. Other parts were let to other people from year to year. Some of the windows in the plaintiff's house were ancient lights. Temple Street is a street which runs north and south, and is from 35 to 37 ft. wide. Opposite to the plaintiff's house, which had a considerable frontage, was a large house having a frontage of 77 ft., and an elevation of 37 ft. or thereabouts, above the level of the street. This house was the property of the plaintiff's lessor, and was let to the defendant on a lease of ninety-nine years. The defendant had pulled down the house, and proposed to erect in its place a large building about 25 ft. higher than before, and when the writ was issued part of the front wall of the new building, having a frontage of 27 ft., had been erected to a height of 24½ ft. higher than the old building; but no other part of the new building had been carried up higher than 37 ft. The plaintiff's house stood on rising ground and within a few yards of a large open space, which rendered the loss of light less important.

On the 10th of October, 1893, the plaintiff commenced the present action for an injunction to restrain the defendant from building higher than the old house, and to compel him to pull down so much as was already built above that height; the writ also claimed damages.

Mr. Justice Kekewich decided that this was not a case for an injunction, but for damages only.[1]

1893. Dec. 19. LINDLEY, L. J., delivered the judgment of the court (*Lindley, A. L. Smith,* and *Davey,* L. JJ.).

The plaintiff has appealed from this judgment on the ground that he is entitled to an injunction, and that the learned Judge had no jurisdiction to award damages in lieu of an injunction in respect of that part of the house which was not yet higher than the old building which the defendant had pulled down. The plaintiff also complains that the learned Judge had no sufficient materials for estimating the amount of damages, no evidence having been adduced by him on that point, he wanting an injunction and not damages.

The defendant has given no cross-notice of appeal, but he has contended that the learned Judge had jurisdiction to do what he did; that whether an injunction should be granted, or damages be awarded, was a matter for the discretion of the Judge; and that, even if an appeal from the exercise of such discretion will lie, there are no grounds which will justify the Court of Appeal in interfering with its exercise in this particular case. The defendant, moreover, contended that the interference with the plaintiff's lights was and would be so small that the damages awarded were extremely liberal if not extravagant.

The question whether the court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended, is by no means free from difficulty. On the one hand this court, in Dreyfus *v.* Peruvian Guano Company,[2] expressed a clear opinion against the existence of such jurisdiction.[3] On the other hand, it has been very commonly assumed, and there are several observations by eminent Judges favoring the view, that there is such a jurisdiction; and in Holland *v.* Worley[4] the late Mr. Justice Pearson did award damages in lieu of an injunction which, if granted, would have been simply preventive, and in no sense mandatory. The question is one of very great importance; but we do not think it right to keep the parties waiting while we make up our minds upon it. If there is no such jurisdiction, the order appealed from will be wrong. But, assuming the jurisdiction to exist, we are of opinion that, upon the facts of this case, the plaintiff was entitled to an injunction to restrain the defendant from continuing to build higher than the old house, to the detriment of the plaintiff. The learned Judge found as facts that some of the plaintiff's lights were ancient, and that they were already obstructed to a substantial extent, and

1 The arguments and the judgment of Kekewich, J., are omitted. — ED.

2 43 Ch. D. 316.

3 See *per Bowen,* L. J., at p. 333; and *per Fry,* L. J., and *Cotton,* L. J., at p. 342.

4 26 Ch. D. 578.

1903 2 Ch. 335. 340

would be still further obstructed. He found that the plaintiff had sustained, and would sustain, material injury, entitling him to substantial damages. We see no reason to differ from him on these matters of fact. The plaintiff's legal right and its infringement already, and threatened further infringement, to a material extent, being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the court is in the habit of acting in these cases. There might, of course, be circumstances depriving the plaintiff of this *prima facie* right; but we can discover none in this case. The order appealed from, therefore, must be discharged so far as it awards damages only to the plaintiff, and in lieu thereof the order will be to grant an injunction in the ordinary form to restrain the defendant from continuing to build higher than the old building above the level of the street, to the injury of the plaintiff, and to grant an inquiry by the Official Referee as to the damages sustained by the plaintiff by reason of the building already erected beyond that height, and to order the defendant to pay such damages, but to reserve the costs of the inquiry, in order that they may be dealt with by the Judge. The plaintiff having succeeded in his appeal, the defendant must pay the costs of the appeal.

WILSON *v.* TOWNEND.

BEFORE SIR R. T. KINDERSLEY, V. C., NOVEMBER 13, 1860.

[1 *Drewry and Smale*, 324.]

THIS was a motion for an injunction to restrain the defendant from proceeding with the erection of an addition at the rear of his house, No. 6 Eastern Terrace, Brighton, so as to interfere with the access of light and air to the plaintiff's houses, Nos. 5 and 7, in the same terrace.[1]

THE VICE-CHANCELLOR. In this case I reserved my opinion upon two points, which were raised by the defendant.

The first point is this: the defendant insists that, although the plaintiffs might be entitled to the assistance of the court in respect of the nuisance if the plaintiffs themselves occupied the house, and so the nuisance affected their personal comfort and convenience, yet it appeared, on the face of the bill, that it was not the intention of the plaintiffs to occupy their houses or either of them, and that they had purchased the property merely as an investment; and it was contended that therefore the court ought not to interfere, inasmuch as the only injury the plaintiffs could sustain was diminution of the value of their property, for which compensation could be recovered at law. Now I

[1] The statement of the case, the arguments of counsel, and a portion of the judgment are omitted. — ED.

confess, when that objection was started, I was at first much impressed by it; and at one time the inclination of my opinion was in favor of the objection. No doubt the origin of the jurisdiction in cases where the assistance of this court is asked for protection against a nuisance, and where the nature of the nuisance is the blocking up the passage of the light into ancient windows, is the interference with the personal comfort and convenience of the persons occupying the house which has those ancient lights. Upon further consideration, I am of opinion that the objection ought not to prevail.

If the objection were allowed to prevail in such a case as the present, it must equally prevail in the most extreme case. Suppose it happened that the plaintiff's house, in which he did not himself reside, stood upon the very verge of his own ground; and the defendant, whose ground came up to the very wall of the plaintiff's house, built a dead wall within six inches from the whole of the plaintiff's windows, and so completely blocked up all his lights, I confess I should feel very great difficulty in saying, in such a case, that this court would tell him to go to law and get damages, and refuse to interfere itself. But further, I do not see how the line could be drawn so as to distinguish those cases in which the party complaining has acquired the house, not then intending to reside in it himself, and those cases in which he may intend to reside in it. A person may buy a house, not at the time intending to reside in it, but his then intention would not prevent him, at any time afterwards, making it his own personal residence. A man may buy a house which has a lease upon it, and therefore he cannot become the occupant till the lease expires. He may, perhaps, not have any present intention of afterwards occupying the house; but how can I say, in such a case, that, because there is no present interference with his personal comfort and enjoyment, he is not to have that remedy which the court gives in cases of nuisance, when it may be that he may afterwards reside in the house? He may induce the tenant to give up his lease, and he may himself become the occupant. Further, I find that, of the two plaintiffs who are tenants in common of this property, it is only one of them (Mr. Wilson) who has expressed any intention on the subject. The other tenant in common, Mr. Stoddart, has not intimated any such intention, and, for aught I know, there may be at any time an arrangement between the plaintiffs for either of them to take one of the houses to reside in, and, for aught I know, it may be Mr. Stoddart's present intention to make such an arrangement to occupy the house. When the court has once established the doctrine that it will interfere to protect the legal right, you cannot inquire particularly whether the party who complains does or does not mean at any subsequent time himself to be the occupier. And in a great number of cases this court does interfere to prevent an injury in respect of a legal right, simply on the ground of the damage which may be produced to property; and I think that I ought not to allow this objection to prevail.[1]

[1] The plaintiff having enlarged some of the ancient lights and made new ones, the de-

YATES *v.* JACK.

BEFORE LORD CRANWORTH, C., MARCH 24, 1866.

[*Law Reports*, 1 *Chancery Appeals*, 295.]

THE plaintiffs in this case, G. B. Yates and H. G. Yates, were merchants carrying on an extensive business at a warehouse, No. 3 and 4, Lower East Smithfield, in the city of London, which was rebuilt by them in 1837, and had a frontage of twenty-nine feet. The width of the street was twenty-five feet two inches, and the defendant Charles Jack was the owner of the land on the opposite side of the street, with a frontage of ninety feet, on which buildings formerly stood, some thirty-two feet high to the parapet, and some twenty feet. The defendant had lately pulled down these buildings, and proposed to erect others, set back six feet, but sixty-seven feet high, immediately opposite to and much wider than the frontage of the plaintiffs; and the plaintiffs filed this bill to restrain the defendant from obstructing their ancient lights. A great deal of evidence was entered into on both sides, in order to prove on behalf of the plaintiffs, that their warehouse would be materially darkened and that they would not be able to carry on their business so well, especially in judging samples; and on the part of the defendant, that no material injury would be done to the plaintiffs, and particularly that there would be ample light for the business carried on by them; and, in fact, that the screening off of the direct rays of the sun would be a positive advantage. The cause came before the Vice-Chancellor Wood, on motion for decree, and his Honor made a decree declaring that the plaintiffs were entitled to the free access of air and light to such an extent as would enable them to enjoy their messuage and warehouse for the purpose of their business without any material diminution of their former use and enjoyment.

The plaintiffs appealed from this decree.[1]

LORD CRANWORTH, L. C. An attentive consideration of the evidence of the trade witnesses, on the one side and on the other has led me to the conclusion, as did the evidence of the architects, that the erection of the new buildings will materially interfere with the quantity of light necessary or desirable for the plaintiffs in the conduct of their business. I desire, however, not to be understood as

fendant claimed the right to prevent the acquisition of a right to the new and the altered windows, even though to do so he must obstruct the ancient lights. The Vice-Chancellor, in view of the decision of Renshaw *v.* Bean, 18 Q. B. 112, which supported the defendant's claim, thought it expedient to refer the decision of this point to a court of law. The law was afterwards settled against the defendant's contention, and Renshaw *v.* Bean and the similar case of Cooper *v.* Hubbuck, 30 Beav. 160, were overruled by Tapling *v.* Jones, 11 H. L. C. 290. See to the same effect Staight *v.* Burn, 5 Ch. 163; Aynsley *v.* Glover, 10 Ch. 283, 288, 18 Eq. 544; Newson *v.* Pender, 27 Ch. D. 43. — ED.

[1] The statement of the case is curtailed, and the arguments of counsel together with a portion of the judgment are omitted. — ED.

saying that the plaintiffs would have no right to an injunction unless the obstruction of light were such as to be injurious to them in the trade in which they are now engaged. The right conferred or recognized by the statute 2 & 3 Wm. 4, c. 71 is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me, which it does not, that for the purpose of their present business a strong light is not necessary, and that the plaintiffs will still have sufficient light remaining, I should not think the defendant had established his defence unless he had shown that for whatever purpose the plaintiffs might wish to employ the light, there would be material interference with it.[1] I need not further investigate the evidence, but the result of it is to convince me that the new buildings proposed to be erected by the defendant cannot fail to inflict a serious injury on the plaintiffs by materially obstructing the light which they have heretofore enjoyed.

The consequence is, that they are entitled to an injunction restraining the defendant from erecting any building so as to darken, injure, or obstruct any of the ancient lights of the plaintiffs as the same were enjoyed previously to the taking down by the defendant of his buildings on the opposite side of the street, and also from permitting to remain any buildings already erected, which will cause any such obstruction.[2]

[1] Dent *v.* Auction Co., L. R. 2 Eq. 238, 250; Calcraft *v.* Thompson, 15 W. R. 387, 388 (discrediting Jackson *v.* Duke of Newcastle, 3 D. J. & S. 275; Younge *v.* Shaper, 21 W. R. 135; Aynesley *v.* Glover, 18 Eq. 544, 10 Ch. 283 (discrediting Jackson *v.* Duke of Newcastle, 3 D. J. & S. 275; Moore *v.* Hall, 3 Q. B. D. 178; Atty.-Gen. *v.* Queen's Mansions, 5 Times, L. R. 430; Lazarus *v.* Artistic Co. 1897, 2 Ch. 214; Warren *v.* Brown, 1902, 1 K. B. 15; Home Stores *v.* Colis, 1902, 1 Ch. 302 (overruling Lanfranchi *v.* Mackenzie, 4 Eq. 427; Dickinson *v.* Harbottle, 28 L. T. Rep. 186) *Accord.* — Ed.

[2] Injunctions to prevent the disturbance of the easement of light were infrequent prior to 1860. In the last forty years the reported cases of such bills are numerous. In the following cases plaintiffs obtained injunctions: Morris *v.* Berkeley, 2 Ves. Sr. 453 (*semble*); Sutton *v.* Lord Montfort, 4 Sim. 559 (temporary injunction until right determined at law); Potts *v.* Levy, 2 Drew. 272 (no need of trial at law, since plaintiff's right was conceded); Areedeckne *v.* Kelk, 2 Giff. 683; Herz *v.* Union Bank, 2 Giff. 686; Gale *v.* Abbot, 8 Jur. N. S. 987; Simper *v.* Foley, 2 J. & H. 555 (plaintiff a tenant from year to year); Stokes *v.* City Offices Co., 2 H. & M. 650, affirmed, 13 L. T. Rep. 81; Dent *v.* Auction Co., L. R. 2 Eq. 238; Martin *v.* Headon, L. R. 2 Eq. 425; Beadel *v.* Perry, L. R. 3 Eq. 465; Staight *v.* Burn, 5 Ch. 163 (explaining and qualifying Heath *v.* Bucknall, 8 Eq. 1); Dyers Co. *v.* King, 9 Eq. 438 (although plaintiff's light was increased from other sources); Kelk *v.* Pearson, 6 Ch. 809; Young *v.* Shaper, 21 W. R. 135; Weston *v.* Arnold, 8 Ch. 1084; Aynesley *v.* Glover, 10 Ch. 283, 18 Eq. 544; Theed *v.* Debenham, 2 Ch. D. 165 (explaining Hackett *v.* Baiss, 20 Eq. 494); Ecclesiastical Commissioners *v.* Kino, 14 Ch. Div. 213; Allen *v.* Taylor, 16 Ch. D. 355; Newson *v.* Pender, 27 Ch. Div. 43; Mitchell *v.* Cantrill, 37 Ch. Div. 56; Atty.-Gen. *v.* Queen Anne Mansions, 5 Times L. R. 430; Bass *v.* Gregory, 25 Q. B. D. 481 (easement of air through a tunnel); Phillips *v.* Low, 1892, 1 Ch. 47; Robson *v.* Edwards, 1893, 2 Ch. 146; Alden *v.* Latimer, 1894, 2 Ch. 437 (right to air); Collins *v.* Laugher, 1894, 3 Ch. 659; Battersea *v.* Commissioners, 1895, 2 Ch. 708; Broomfield *v.* Williams, 1897, 1 Ch. 602 (*semble*); Lazarus *v.* Artistic Co., 1897, 2 Ch. 214; Smith *v.* Baxter, 1900, 2 Ch. 138; Pollard *v.* Gare, 1901, 1 Ch. 834; Clawson *v.* Primrose, 4 Del. Ch. 643 (but see Hulley *v.* Security Co., 5 Del. Ch. 578).

In the folowing cases the plaintiff failed, either because he could not establish his easement, or because he could not prove a disturbance of it: Fishmonger's Co. *v.* E. I. Co., 1 Dick. 163; Wynstanley *v.* Lee, 2 Sw. 333 (temporary injunction denied until plaintiff's

SMITH *v.* SMITH.

Before Sir George Jessel, M. R., June 11, 1875.

[*Law Reports*, 20 *Equity*, 500.]

The object of this suit was to obtain a mandatory injunction for the removal of a building which, as the plaintiff alleged, interfered with the access of light and air to his house.[1]

Sir G. Jessel, M. R. The present case has been argued on a single point. It was admitted that, looking to the circumstances of the case, the court would have granted a mandatory injunction before Lord Cairns' Act; but it was contended that, having regard to the provisions of that Act, no such injunction ought to be granted, but that an inquiry as to damages should be directed.

I will first consider the case independently of the Act. The house was in the occupation of the plaintiff, so that he was at once owner and occupier, a point considered of some importance in Curriers' Company *v.* Corbett. The injury was indisputable. The height of the old wall was nine feet, that of the new wall, which was exactly opposite to some of the plaintiff's windows, was twenty-six feet eight inches. According to the plaintiff's statement, the light was almost entirely obscured, the rooms could scarcely be used except by gas-light, in addition to which he and his family had been injured in health, and his wife and daughter obliged to leave the house; while the room above the kitchen, which he used as a workshop, where a good light was required, had been rendered useless for that purpose.

[His honor then referred to the progress of the buildings, and to the communications addressed to the defendant before the bill was filed, which was on the 19th of March, and considered that the plaintiff would, under the circumstances, have been entitled to a mandatory injunction before Lord Cairns' Act.]

As to mandatory injunctions, their history is a curious one, and may account for some of the expressions used by the judges in some of the cases cited. At one time it was supposed that the court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance. The court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it.

right was established at law); Radcliffe *v.* Portland, 3 Giff. 702; Johnson *v.* Wyatt, 33 L. J. Ch. 394; Carriers Co. *v.* Corbett, 13 L. T. Rep. 154 (affirming s. c. 2 Dr. & Sm. 355); Clarke *v.* Clark, 1 Ch. App. 16; Durrell *v.* Pritchard, 1 Ch. App. 244; Robson *v.* Whitingham, 12 Jur. N. S. 40; Lanfranchi *v.* Mackenzie, 4 Eq. 421 (overruled); London Co. *v.* Tennant, 9 Ch. 212; Kino *v.* Rudkin, 6 Ch. D. 160; Pendarves *v.* Monro, 1892, 1 Ch. 611; Corbett *v.* Jones, 1892, 3 Ch. 137; Harris *v.* De Pinna, 33 Ch. D. 238; Beddington *v.* Atlee, 35 Ch. D. 317; Birmingham Co. *v.* Ross, 38 Ch. D. 295. — Ed.

[1] The statement of facts, the arguments of counsel, and a small portion of the judgment are omitted. — Ed.

To that proposition I can by no means assent. Every injunction requires to be granted with care and caution, and I do not know what is meant by extraordinary caution. Every judge ought to exercise care, and it is not more needed in one case than in another.

In looking at the reason of the thing, there is not any pretence for such a distinction as was supposed to exist between this and other forms of injunction. If a man is gradually fouling a stream with sewage, the court never has any hesitation in enjoining him. What difference could it make if instead of fouling it day by day he stopped it altogether? In granting a mandatory injunction, the court did not mean that the man injured could not be compensated by damages, but that the case was one in which it was difficult to assess damages, and in which, if it were not granted, the defendant would be allowed practically to deprive the plaintiff of the enjoyment of his property if he would give him a price for it. Where, therefore, money could not adequately reinstate the person injured, the court said, as in cases of specific performance, "We will put you in the same position as before the injury was done." When once the principle was established, why should it make any difference that the wrong-doer had done the wrong, or practically done it before the bill was filed? It could make no difference where the plaintiff's right remained and had not been lost by delay or acquiescence.

Then what difference was introduced by Lord Cairns' Act? Before the Act it was a matter of right to obtain the injunction. By that Act the court had a discretion to substitute damages where it thought proper. Now this discretion must be a judicial discretion, exercised according to something like a settled rule, and in such a way as to prevent the defendant doing a wrongful act, and thinking that he could pay damages for it. Without laying down any absolute rule, in the first place it is of great importance to see if the defendant knew he was doing wrong, and was taking his chance about being disturbed in doing it.

The next point for consideration is the materiality of the injury to the plaintiff, as stated by Bramwell, B., in Jessel *v.* Chaplin,[1] but that alone was not sufficient; all the circumstances of the case must be taken into consideration, not only the injury to the plaintiff, but also the amount which has been laid out by the defendant.

In the present case the injury was most serious to the plaintiff, and he could not be compensated without the defendant buying the house, while as regards the defendant I am not satisfied that any considerable sum has been laid out upon his buildings. Again, the plaintiff was occupier of the house, so that it was a personal injury to him. Taking all the circumstances together, therefore, I think I have no right to say that the plaintiff is to give up the house and take pecuniary compensation for it, because it is more convenient to the defendant. I shall grant a mandatory injunction in accordance with the terms of the prayer, and following the order made in Jessel

[1] 2 Jur. (N. S.) 931.

v. Chaplin, direct that it is not to operate for two months, and the defendant to pay the costs of the suit.[1]

RYDER *v.* BENTHAM.

Before Lord Hardwicke, C., August 7, 1750.

[1 *Vesey, Senior*, 543.]

Motion for an order to pull down certain blinds so put up as to obstruct plaintiff's houses.

The Lord Chancellor said he never knew an order to pull down anything on motion;[2] it is sometimes though rarely done on a decree. The court will indeed sometimes on motion order the going on to be stopped; but the answer coming in last night, he desired it should be moved next day.

When it was argued that the court might interpose instantly by interlocutory order to prevent that for which damages will lie at law, but which are not an adequate remedy, the court will order a building which is erecting, not to be further proceeded in,[3] though not directed to be pulled down; as that might do irreparable mischief to one party if on final hearing the right should be with him: and on that ground will not stay the working a mine; but that is not the present case; for by order to restrain from going on, it will be included that this shall not stand. On a right to a water-course or salt springs, if one working under ground diverts the stream, and on motion the court is of opinion the plaintiff has a right to prevent the

[1] Specific reparation of the tort was enforced by a mandatory injunction in the following cases: Dunball *v.* Waters, 12 L. T. Rep. 759 (*semble* — removal of warehouse); Durell *v.* Pritchard, 1 Ch. Ap. 244 (taking down buildings); Beadel *v.* Perry, L. R. 3 Eq. 465 (removing top of building — on interlocutory application); Staight *v.* Burn, 5 Ch. 163 (*semble* — on interlocutory application); Kelk *v.* Pearson, 6 Ch. 809 (pulling down a wall); Baxter *v.* Bowen, 44 L. J. Ch. 625 (removal of shed); Wilson *v.* Queen's Club, 1891, 3 Ch. 522 (removal of hoarding); Parker *v.* First Co., 24 Ch. Div. 282 (removal of wall); Lazarus *v.* Artistic Co., 1897, 2 Ch. 214 (removal of building); Clifford *v.* Holt, 1899, 1 Ch. 698 (removal of wall); Home Stores *v.* Colls, 1902, 1 Ch. 302 (removal of top of building).

In the following cases a mandatory injunction was denied: Gale *v.* Abbot, 8 Jur. N. S. 987 (*semble* — interlocutory injunction rarely granted); Jacomb *v.* Knight, 3 D. J. & S. 533 (plaintiff a tenant from year to year who after suit begun was notified to quit); Isenberg *v.* E. I. Co., 33 L. J. Ch. 392, 10 Jur. N. S. 221 (balance of convenience against granting an injunction); Sparling *v.* Clawson, 17 W. R. 518 (balance of convenience against injunction); Currier's Co. *v.* Corbett, 4 D. J. & S. 764 (*semble* — taking down a building); Senior *v.* Pawson, L. R. 3 Eq. 330 (right lost by laches and acquiescence); Lady Stanley *v.* Shrewsbury, 19 Eq. 616 (balance of convenience against injunction); Webster *v.* Whewell, 42 L. T. Rep. 868 (removal of large shop — small damage to plaintiff); Bonner *v.* Great West. Co., 24 Ch. Div. 1 (balance of convenience against granting an interlocutory injunction). — Ed.

[2] "The court is slow to grant an interlocutory mandatory injunction. Gale *v.* Abbot, 8 Jur. N. S. 987 (*semble*). An application for such an injunction because of obstruction of plaintiff's light was refused in Bonner *v.* Great West. Co., 24 Ch. Div. 1; but was granted in Beadel *v.* Perry, L. R. 3 Eq. 465. See also Staight *v.* Burn, 5 Ch. 163. — Ed.

[3] Whoever comes into this court on such a right must found it either on defendant's building so as to stop ancient lights, for which he has prescription (notwithstanding that he must lay a particular prescription) or else on some agreement, either proved, or reasonable presumption thereof." *Per* Lord Hardwicke in Morris *v.* Lord Berkeley, 2 Ves. Sr. 453. See, to the same effect, Atty.-Gen. *v.* Doughty, 2 Ves. Sr. 453. — Ed.

injury during the hearing, it will be ordered to go in the mean time as before: as his lordship held in Lawton *v.* Lawton, which came out of Cheshire. It is only to keep things as they are, till a final determination.

It being agreed that this must be tried, the Lord Chancellor said the sooner the better, and to grant an injunction in mean time, and then this scaffold should be removed. Let the parties therefore by consent proceed to a trial at law in *case* by the plaintiff, for stopping up his lights; and the defendant to pull down the scaffold or poles and boards already raised, and be enjoined from building or erecting, whereby any of plaintiff's lights may be obstructed, till after trial had.[1]

VON JOEL *v.* HORNSEY.

Court of Appeal, July 17, 1895.

[*Law Reports*, (1895) 2 *Chancery*, 774.]

Appeal from an order of Kekewich, J.

The action was brought by H. Von Joel, the owner, and A. G. Johnson, the tenant, of a house in Fetter Lane, to restrain the defendant from rebuilding his house on the opposite side of the street to such a height as to obstruct the ancient lights of the plaintiffs' house.

On May 23, 1895, the plaintiffs, through their solicitor, sent a letter to the defendant, objecting to the new building being erected to such a height as to interfere with the plaintiffs' light, and threatening that if he persisted an action would be brought to restrain him.

On May 24 the defendant's clerk called about the letter, but would give no promise to desist from the building, and was told that a writ would be forthwith issued. On the afternoon of the same day the writ in the action was issued, and the plaintiffs endeavored to serve it on the defendant; but he kept out of the way and evaded the service of the writ until May 28, on which day the plaintiffs obtained an order for substituted service, and the writ was in this way served.

Meanwhile, from the 24th to the 28th, the defendant actively carried on the building; but it did not appear that he put on additional workmen to expedite the work. On the 30th the gable of the house was built to its full height, and the evidence of the plaintiffs showed that it materially interfered with their ancient lights.

On May 30 the plaintiffs obtained an interim injunction for a few days; and on July 11 Kekewich, J., granted an interlocutory injunction till the trial restraining the defendant from erecting his building so as to obstruct the plaintiffs' lights, and from permitting so much of the new gable as had been built on and after May 24 from remaining

[1] Atty.-Gen. *v.* Bentham, 1 Dick 277 s. c. — Ed.

as built, the portion to be pulled down being defined by a red line on a photograph. The defendant, with the leave of the judge, appealed from this order.[1]

Lindley, L. J. It seems to me obvious that there is a cause of action in this case. I purposely abstain from expressing any opinion whether at the trial the plaintiffs will be entitled to an injunction. But Kekewich, J., has granted an interlocutory injunction to restrain the defendant from going on with his building, and a mandatory injunction to pull down a certain portion of his building, namely, that which he has hurried up since May 24, 1895. Now, having regard to the letter written by the plaintiffs' solicitor on May 23, and to the affidavits, the conclusion is irresistible that the building was hurried on as fast as the defendant could hurry it on after May 23 in order that he might say, "I have got it up." The case is within the principle upon which this court acted in Daniel *v.* Ferguson,[2] and upon which I will always act. The court will not allow itself to be imposed upon by a proceeding of that kind. If builders will take the chance of running up a building in that way they must take the risk of pulling it down; and to that extent I think Kekewich, J., was perfectly justified in the view that he took; and this appeal must be dismissed, with costs.[3]

THORPE *v.* BRUMFITT.

Before Sir W. M. James and Sir G. Mellish, L. JJ., May 1, 1873.

[*Law Reports*, 8 *Chancery Appeals*, 650.]

The case made by the bill was that the defendants, tenants of one Morrell, under different leases, caused the plaintiff's right of way to his inn to be obstructed with carts and wagons. The Master of the Rolls granted an injunction.[4]

Sir W. M. James, L. J. The plaintiff cannot complain, unless he can prove an obstruction which injures him. The case is not like one of trespass, which gives a right of action though no damage be proved. In the present case I cannot come to any other conclusion than that arrived at by the Master of the Rolls, that the right of access to the inn yard has been interfered with in a way most prejudicial to the plaintiff. Nothing can be much more injurious to the owner of an inn than that the way to his yard should be constantly

[1] The arguments of counsel and the concurring judgments of Lopes and Rigby, L. JJ., are omitted. — Ed.

[2] [1891] 2 Ch. 27.

[3] Smith *v.* Day, 13 Ch. Div., 651 (*semble*); Daniel *v.* Ferguson, 1891, 2 Ch. 27 *Accord.* — Ed.

[4] Only a portion of the judgment of James, L. J., is given. Mellish, L. J., delivered a concurring judgment. — Ed.

obstructed by the loading and unloading of heavy wagons. If a person who was going to put up his horses at the inn was stopped by the loading or unloading of wagons, he would probably at once go to another inn. Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if he stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant.

JAMES C. TUCKER AND ANOTHER *v.* OWEN HOWARD.

SUPREME JUDICIAL COURT, MASSACHUSETTS, FEBRUARY 27, 1880.

[128 *Massachusetts Reports*, 361.]

BILL in equity for an injunction against obstructing a passageway running from Merrimack Street in Boston, by erecting the wall of a building within it. A preliminary injunction was refused; and the defendant completed the wall. Upon a hearing on the merits, it appeared that the plaintiffs owned the land on one side of the passageway, and the defendant owned the land on the other side of the passageway and in the rear of it; that the plaintiffs had by deed "the right to pass and repass in, upon and over" the passageway in question, which was described as "five feet wide and ten feet high;" and that the defendant had the right to build over the passageway, leaving it "five feet wide in the clear, and not less than ten feet high;" and it was decided that the plaintiffs had the right to a way of the dimensions stated, and not merely to a convenient right of way; and that the wall erected within the passageway was in violation of the plaintiffs' right.[1]

At the hearing on the master's report, Endicott, J., entered a final decree, commanding the defendant to alter his building, and to pay to the plaintiffs the sum of $462 [the damage caused pending the suit], as reported by the master, and costs. The defendant appealed to the full court.[2]

GRAY, C. J. The defendant, since the filing of this bill, has built a wall in the plaintiffs' passageway, which has been decided to be a

[1] 122 Mass. 529.

[2] Only the opinion of the court is given. — ED.

violation of their right. Tucker *v.* Howard.[1] The plaintiffs' right in the passageway included the right to so much light and air as was necessarily incident to the use of the passageway. Atkins *v.* Bordman.[2] The master finds that the permanent damage to the plaintiffs' estate, if the defendant's building is allowed to remain as it is, is $200, and that the building can be altered in the manner directed by the decree appealed from at an expense of $530. The fact that no temporary injunction has been granted does not affect the kind or the extent of the remedy to which the plaintiffs are entitled upon establishing their right at the hearing on the merits. The defendant having, by the service of process, full knowledge of the plaintiffs' claim, went on to build at his own risk; and the injury caused to the plaintiffs' estate by the defendant's wrongful act being substantial, a court of equity will not allow the wrongdoer to compel innocent persons to sell their right at a valuation, but will compel him to restore the premises, as nearly as may be, to their original condition. Dent *v.* Auction Mart Co.;[3] Aynsley *v.* Glover;[4] Krehl *v.* Burrell;[5] Schwoerer *v.* Boylston Market Association;[6] Creely *v.* Bay State Brick Co.;[7] Nash *v.* New England Ins. Co.;[8] Salisbury *v.* Andrews.[9] The decree for a mandatory injunction, and for payment of damages suffered pending the suit, and for costs to the plaintiffs as the prevailing party, must therefore be *Affirmed with costs.*[10]

HIRAM HART *v.* WILLIAM T. LEONARD.

COURT OF ERRORS AND APPEALS, NEW JERSEY, NOVEMBER TERM, 1886.

[42 *New Jersey Equity Reports*, 416.]

DIXON, J.[11] The bill in this case avers that the complainant is the owner of a wood and pasture lot containing three and thirty-seven hundredths acres of land, and that he and his predecessors in title have, by adverse user for over twenty years, acquired a right of way across the lands of the defendant from a certain public road to said lot; that the defendant now obstructs said way; and the bill therefore prays a decree that the complainant is entitled to the way, and a mandatory injunction, commanding the defendant to remove the obstruction, and allow the complainant to pass through at his pleasure.

1 122 Mass. 529. 2 2 Met. 457. 3 L. R. 2 Eq. 238, 246, 255.
4 L. R. 18 Eq. 544, and L. R. 10 Ch. 283. 5 7 Ch. D. 551, and 11 Ch. D. 146.
6 99 Mass. 285. 7 103 Mass. 514.
8 127 Mass. 91. 9 128 Mass. 336.

10 Krehl *v.* Burrell, 7 Ch. D. 551, 11 Ch. Div. 146; O'Brien *v.* Goodrich, 177 Mass. 32 *Accord.*

Right to mandatory injunction may be lost by laches. Starkie *v.* Richmond, 155 Mass. 188 (delay of 9 years). — ED.

11 Only the opinion of the court is given. — ED.

The answer denies the complainant's right.

The complainant's testimony tends to show user for over twenty years. The defendant's testimony tends to show that the user was not adverse, but was by his express permission, as an act of neighborly accommodation.

The vice-chancellor advised a decree and injunction, according to the prayer of the bill. Hence this appeal.

From the foregoing statement it appears that the claim set up is to a purely legal interest in lands, resting upon a purely legal basis. Before attempting to determine the validity of the claim, it is proper to consider whether the question presented comes within the cognizance of a court of equity.

No doubt many cases arise in which courts of equity may, by decree and injunction, protect and enforce legal rights in real estate. So far as they are exemplified in our chancery practice, these cases can, I think, be classified under the following heads: —

1. Cases where the legal right has been established in a suit at law, and the bill in equity is filed to ascertain the extent of the right and enforce or protect it in a manner not attainable by legal procedure. Quackenbush *v.* Van Riper.[1]

2. Cases where the legal right is admitted, and the object of the bill is the same as in the class just mentioned. Carlisle *v.* Cooper;[2] Shivers *v.* Shivers;[3] Johnston *v.* Hyde.[4]

3. Cases where the legal right, though formally disputed, is yet clear, on facts which are not denied and legal rules which are well settled, and the object of the bill is as before stated. Shreve *v.* Voorhees;[5] Hulme *v.* Shreve;[6] Morris C. & B. Co. *v.* Soc. Est. U. M.;[7] Earl *v.* De Hart;[8] Dodd *v.* Flavell;[9] Johnson *v.* Jaqui;[10] Demarest *v.* Hardham;[11] Higgins *v.* Flemington Water Co.[12]

4. Cases where one attempts to appropriate the land of another, under color of statutory authority, without complying with the legal conditions precedent. Ross *v.* Eliz. & Som. R. R. Co.;[13] Browning *v.* C. & W. R. R. Co.;[14] Higbee *v.* C. & A. R. R. Co.;[15] Folley *v.* Passaic;[16] Morris C. & B. Co. *v.* Jersey City.[17]

5. Cases where the object of the bill is to stay waste. Capner *v.* Flem. Min. Co.;[18] Bank of Chenango *v.* Cox.[19]

6. Cases where the object of the bill is to prevent an injury which will be destructive of the inheritance, or which equity deems irreparable, *i. e.*, one for which the damages that may be recovered according to legal rules do not afford adequate compensation. Morris C. & B. Co. *v.* Jersey City;[20] Franklinite Co. *v.* Zinc Co.;[21] Zinc Co. *v.* Frank-

1 2 Gr. Ch. 350. 2 6 C. E. Gr. 576. 3 5 Stew. Eq. 578; s. c. 8 Stew. Eq. 502.
4 6 Stew. Eq. 632. 5 2 Gr. Ch. 25. 6 3 Gr. Ch. 116.
7 1 Hal. Ch. 203. 8 1 Beas. 280. 9 2 C. E. Gr. 255.
10 10 C. E. Gr. 410; s. c. 12 C. E. Gr. 526. 11 7 Stew. Eq. 469.
12 9 Stew. Eq. 538. 13 1 Gr. Ch. 422. 14 3 Gr. Ch. 47.
15 4 C. E. Gr. 276. 16 11 C. E. Gr. 216. 17 11 C. E. Gr. 294.
18 2 Gr. Ch. 467. 19 11 C. E. Gr. 452. 20 3 Stock. 13
21 2 Beas. 215.

linite Co.;[1] Zinc Co. *v.* Franklinite Co.;[2] Southmayd *v.* McLaughlin;[3] Manko *v.* Chambersburgh;[4] Johnston *v.* Hyde;[5] Thomas Iron Co. *v.* Allentown Mining Co.;[6] Fulton *v.* Greacen;[7] Lord *v.* Carbon Iron M. Co.[8]

7. Cases where the object of the bill is to protect one's dwelling from injuries which render its occupancy insecure or uncomfortable. Brakely *v.* Sharp;[9] Holsman *v.* Boiling Spring Co.;[10] Ross *v.* Butler;[11] De Veney *v.* Gallagher;[12] Cleveland *v.* Citizens' Gas Light Co.;[13] Babcock *v.* N. J. Stock Yard Co.;[14] Attorney-General *v.* Steward;[15] Meigs *v.* Lister;[16] De Luze *v.* Bradbury;[17] Kana *v.* Bolton;[18] Williams *v.* Osborne;[19] Penn. R. R. Co. *v.* Angel;[20] Lennig *v.* Ocean City Association.[21]

8. Cases where the right to be protected or enforced grows out of the expressed or implied terms of a contract, so that the court can entertain jurisdiction by virtue of its power to compel specific performance. Robeson *v.* Pittenger;[22] Armstrong *v.* Potts;[23] Jaqui *v.* Johnson;[24] Shimer *v.* Morris C. & B. Co.;[25] Iszard *v.* Mays Landing W. P. Co.;[26] Pope *v.* Bell;[27] Sutphen *v.* Therkelson;[28] Gawtry *v.* Leland;[29] Lennig *v.* Ocean City Association.[30]

9. Cases where the object of the bill is to prevent a multiplicity of suits, otherwise rendered necessary by the fact that many persons are interested in the controversy. Britton *v.* Hill.[31]

Outside of these classes there is no jurisdiction in a court of equity over the invasion of mere private legal rights in land. The appropriate remedy is by suit at law.

The case in hand does not come within any of these classes. It bears no trace of resemblance to any except those of the third or those of the sixth class. But the third class does not include it, because the evidence shows a substantial dispute over the fact of adverse user, which the defendant is entitled to have settled by the verdict of a jury; and the sixth class does not cover it, because the temporary obstruction of a way to a small wood and pasture lot can be fully paid for by the damages recoverable according to legal rules.

The decree below should be reversed, and the bill should be dismissed.[32]

Decree unanimously reversed.

[1] 2 Beas. 322.
[2] 2 McCart. 418.
[3] 9 C. E. Gr. 181.
[4] 10 C. E. Gr. 168.
[5] 10 C. E. Gr. 454.
[6] 1 Stew. Eq. 77.
[7] 9 Stew. Eq. 216.
[8] 11 Stew. Eq. 452.
[9] 2 Stock. 206.
[10] 1 McCart. 335.
[11] 4 C. E. Gr. 294.
[12] 5 C. E. Gr. 33.
[13] 5 C. E. Gr. 201.
[14] 5 C. E. Gr. 296.
[15] 5 C. E. Gr. 415; s. c. 6 C. E Gr. 340.
[16] 8 C. E. Gr. 199.
[17] 10 C. E. Gr. 70.
[18] 9 Stew Eq. 21.
[19] 13 Stew. Eq. 235.
[20] 14 Stew. Eq. 316.
[21] 14 Stew. Eq. 606.
[22] 1 Gr. Ch. 57.
[23] 8 C. E. Gr. 92.
[24] 11 C. E. Gr. 321.
[25] 12 C. E. Gr. 364.
[26] 4 Stew. Eq. 511.
[27] 8 Stew. Eq. 1.
[28] 11 Stew. Eq. 318.
[29] 13 Stew. Eq. 323.
[30] 14 Stew. Eq. 606.
[31] 12 C. E. Gr. 389.

[32] Plaintiff's right being disputed and no danger of irreparable damage appearing, the right to an injunction was denied in the following cases until the right to the alleged easement had been determined at law. Oswald *v.* Wolf, 129 Ill. 200; Indianapolis Co. *v.* Indianapolis, 29 Ind. 245; Amelung *v.* Seekamp, 9 Gill. & J. 468; Gulick *v.* Fisher, (Md.

1901) 48 Atl. R. 375; Wakeman *v.* N. Y. Co., 35 N. J. Eq. 496; Booraem *v.* North Co., 40 N. J. Eq. 557; Todd *v.* Sloats, 60 N. J. Eq. 507; Rhea *v.* Forsyth, 37 Pa. 503; King *v.* McCully, 38 Pa. 76.

An injunction was granted to restrain the disturbance of an easement of way in the following cases, although the title was disputed and there had been no action at law: Kirkpatrick *v.* Brown, 59 Ga. 450; Murphey *v.* Harker, 115 Ga. 77 (temporary injunction); Alexander *v.* Tolleston, 110 Ill. 65 (injunction against disturbance of way in another state); Smith *v.* Young, 160 Ill. 163 (objection to jurisdiction at the hearing comes too late); Cleveland Co. *v.* Munsell, 192 Ill. 430 (*semble* — like preceding case); Simons *v.* Morehouse, 88 Ind. 391; Devon *v.* Ellis, 62 Iowa, 505 (no objection raised to the jurisdiction); Price *v.* Baldauf, 82 Iowa, 669 (temporary injunction); White *v.* Flannigan, 1 Md. 525; Roman *v.* Straus, 10 Md. 89; Shipley *v.* Caples, 17 Md. 179 (temporary injunction); Darlington Co. *v.* Pee Dee Co. (S. Ca. 1901) 40 S. E. R. 169.

In New York and Virginia it is not thought necessary to have the decision of a common-law court before granting a permanent injunction. Newman *v.* Nellis, 97 N. Y. 285; Nicolls *v.* Wentworth, 100 N. Y. 455; Avery *v.* N. Y. Co., 106 N. Y. 142; Valentine *v.* Schreiber, 3 N. Y. Ap. Div. 235; Wheeler *v.* Gilsey, 35 How. Pr. 139; Sanderlin *v.* Baxter, 76 Va. 299.

If the plaintiff's right to the easement is admitted, he is entitled to an injunction against its disturbance. Stallard *v.* Cushing, 76 Cal. 472; McCann *v.* Day, 57 Ill. 101; Swan *v.* Burlington, 72 Iowa, 652; Schaidt *v.* Blaul, 66 Md. 141; Webber *v.* Gage, 39 N. H. 182; Kean *v.* Asch, 27 N. J. Eq. 57; Shivers *v.* Shivers, 32 N. J. Eq. 578; Shreve *v.* Mathies, (N. J. Eq. 1902) 52 Atl. R. 234; Bright *v.* Allen, (Pa. 1902) 53 Atl. R. 248; Gorton *v.* Tiffany, 14 R. I. 95; Chance *v.* East Texas Co., 63 Tex. 152.

Even though the plaintiff's right is disputed and has not been established at law, equity, in most jurisdictions, will grant a permanent injunction against its disturbance, if satisfied that there is no reasonable doubt as to the existence of the easement. Selby *v.* Nettlefold, 9 Ch. 111; United Co. *v.* Great East. Co., 10 Ch. 586; Newell *v.* Lass, 142 Ill. 104; Lowery *v.* Pekin, 186 Ill. 387; Burke *v.* Wall, 29 La. An. 38; Kelly *v.* Saltmarsh, 146 Mass. 585; McConnell *v.* Rathbun, 46 Mich. 303; Lakeman *v.* Hamilton Co., 36 Mo. Ap. 363; French *v.* Smith, 40 N. J. Eq. 361; Hodge *v.* Giese, 43 N. J. Eq. 342; Miller *v.* Lynch, 149 Pa. 460; Clark *v.* White, 2 Swan, 540 (*semble*); Melville *v.* Fallon, Ir. R. 6 Eq. 458.

Mandatory injunctions. — Specific reparation of the tort in the form of a mandatory injunction directing the removal of the obstruction of the way was decreed in the following cases: Stallard *v.* Cushing, 76 Cal. 472; Lakeman *v.* Hannibal Co., 36 Mo. Ap. 363; Webber *v.* Gage, 39 N. H. 182; Shivers *v.* Shivers, 32 N. J. Eq. 578; Hodge *v.* Giese, 43 N. J. Eq. 342.

In the following cases a mandatory injunction was denied: Brande *v.* Grace, 154 Mass. 210 (plaintiff's right as lessee very soon to determine); Hall *v.* Rood, 40 Mich. 46 (a building encroached very slightly upon plaintiff's way, defendant having built in good faith); Welsh *v.* Taylor, 50 Hun, 137 (encroaching building caused very little damage to plaintiff, while its removal would be a great burden to defendant, who acted honestly). An interlocutory mandatory injunction was denied in Nat. Co. *v.* Pa. Co., 54 N. J. Eq. 16.

Easement of drainage. — An injunction restraining the disturbance of the plaintiff's easement of drainage was granted in Baskett *v.* Tippan, 23 Ky. L. Rep. 1895; Kraut's Ap., 70 Pa. 64; Sanderlin *v.* Baxter, 76 Va. 299. — Ed.

SECTION IV.

Nuisance.

OSBURNE *v.* BARTER.

Before Lord Bromley, C., 1583.

[*Choyce Cases in Chancery*, 176.]

The bill was to be relieved of a nuisance committed by the defendant to the plaintiff's mill by erecting a new mill and turning or letting the water-course from serving the plaintiff's mill; but for that the plaintiff since the bill exhibited had brought an assize of nuisance at law, therefore the cause is dismissed, if cause be not shewed.

BUSH *v.* WESTERN.

Before Sir Robert Tracy, Sir John Pratt, Sir James Montagu, Lords Commissioners, Trinity Term, 1720.

[*Precedents in Chancery*, 530.]

The plaintiff had been in possession of a water-course upwards of 60 years; the defendant claimed the land through which the watercourse ran, by virtue of a forfeited mortgage for 100 years, and which he had obtained a decree to foreclose; the plaintiff's title was fully proved, and the bill was for a perpetual injunction to quiet the plaintiff's possession, which the defendant had interrupted by making a cut or channel through his own lands, and setting up a sluice at the mouth thereof, whereby the water that should have ran to the plaintiff's water-course was totally diverted and prevented.

And though it was objected, that if the plaintiff had any damages, his remedy was purely at law, and that they ought not to come hither till they had established their title at law.

Secondly, That if they could, yet they ought to have brought those who had the inheritance of the lands through which the water-course ran, before the court, and that it was not sufficient to have only the mortgagee.

Yet the court decreed for the plaintiff, and agreed it usual to have such bills in the first instance in this court, and cited Lord Aylesford's Case lately, and some others; and if the defendant would have had

the remainder-man a party, he ought in his answer to have shown who that was, that he had only a term for years, and prayed that he might have been made a party; but this he had not done, but insisted on his own title under the foreclosed mortgage; and therefore that objection was overruled.

WELLER *v.* SMEATON.

Before Lord Thurlow, C., May 27, 1784.

[1 *Brown, Chancery*, 572.]

The plaintiff, who was lessee of an ancient mill on the river Ravenstone, filed his bill against the defendant, stating his own title, and charging that the defendant had erected certain flood-gates, and other works upon the said river, above the plaintiff's mill, for the purpose of conveying the water of the said river to Deptford and Greenwich; whereby the plaintiff's mill was obstructed, and that defendant had no right to erect such works, etc.; and praying that the plaintiff might be quieted, by the injunction of this court, in the possession of his mill, and that the defendant might be decreed to pull down his several works, and be restrained by injunction from building any other works, etc.

To so much of the relief prayed as required the works to be pulled down, and the defendant to be restrained, etc., the defendant demurred, for that the plaintiff ought to have established his right at law, in the premises, before he required the aid of this court.

Mr. Mansfield, *Mr. Madocks*, and *Mr. Stanley* for the plaintiff.

The case of Bush *v.* Western proves that this kind of suit is properly brought in this court, in the first instance, without being driven previously to law. It is analogous to the cases of diverting watercourses, which this court has expressly made a head of equity. There are several cases in Viner, tit. Chancery; so The Mayor of York *v.* Pilkington; How *v.* Tenants of Bromsgrove; Ewelme Hospital *v.* Andover.[1] Besides, this demurrer being merely to the relief, a full discovery is now obtained; and it will put the parties to a new and unnecessary trouble and expense. It is not at all the same case as where a plaintiff applies for an injunction.

Mr. Scott and *Mr. King* for the defendants.

This court will never permit a bill of this kind until the right is established at law, for this is a dispute between two individuals, respecting a right in which no third person is concerned, and therefore cannot be said to prevent any multiplicity of suits; Lord Teynham *v.* Herbert; City of London *v.* Perkins;[2] Vin. tit. Chan. 425, pl. 35; Whitchurch *v.* Hide.[3]

[1] 1 Vern. 266. [2] 4 Bro. P. C. 157. [3] 2 Atk. 391.

Lord Chancellor. I take it to be a head of equity to interpose, by way of injunction, when a party is erecting new works upon an old possession; but when the works have been permitted to remain three years, that it is considered as such a laches, as to preclude the party from having relief here, without going first to law.[1] In this case, it has been put upon this ground, that it is within the equity of this court, to take, *ex ab origine*, a question whether or not a right is violated. It struck me immediately, from a general recollection of the cases, that the court have exercised no such jurisdiction. There are two ways in which applications to this court have been made in this kind of cases: first, in order to compel the party to try the right, which was one part of the case of Welby *v.* The Duke of Rutland,[2] in the House of Lords; secondly, to prevent a multiplicity of suits, which was a point in the same case; most of the cases on the subject had been looked into upon that occasion, and it was found that in no instance except that of Bush *v.* Western, this court had ever interposed in a mere question of right between A. and B., they having an immediate opportunity of trying the right at law, which would be definitive. If, after trial, the party should begin again, and commit new trespasses, it is possible a case might be made to induce this court to interpose by way of injunction, but merely when one party claims, and another denies a right, it is impossible for the court to entertain the bill.[3]

Demurrer allowed.

CROWDER *v.* TINKLER.

Before Lord Eldon, C., July 3, 12, 1816.

[19 *Vesey*, 617.]

The bill stated that the plaintiffs were assignees of a lease of which several years were to come, of paper mills at Chilworth, in the county of Surrey; one of them residing in a house adjoining the mills. The defendants were manufacturers of gunpowder, established at the same place many years, at the distance of about four hundred yards from the premises of the plaintiffs. In October, 1815, the defendants

[1] Sprague *v.* Rhodes, 5 R. I. 301 *Contra.* — Ed.

[2] 7 Bro. P. C. 755.

[3] Turpin *v.* Dennis, 139 Ill. 274 (*semble*); Jordan *v.* Woodward, 36 Me. 423; Varney *v.* Pope, 60 Me. 192; Westbrook Co. *v.* Warren, 77 Me. 437; Coe *v.* Winnipiseogee Co., 37 N. H. 254 *Accord.*

But see *Contra*, Soltau *v.* De Held, 2 Sim. N. S. 140, 151; Sprague *v.* Rhodes, 4 R. I. 301; Aldrich *v.* Howard, 7 R. I. 87. 127 N.Y. A.D. 147

In Soltau *v.* De Held, *supra*, Kindersley, V. C., said, p. 151: "Now, it is true, that equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law; there is no such thing as an equitable nuisance: but it is no ground of demurrer that the matter has not been tried at law. It very often is a ground for refusing an injunction; but it is not ground of demurrer." — Ed.

began to erect a building at the distance of about two hundred yards from the paper mills. The plaintiffs, apprehending that the new building was intended for a corning-house or magazine, on the 23d of November gave notice to the defendants that they would take steps to relieve themselves.

The bill charged that the plaintiffs intend to proceed against the defendants to abate or remove the new building as a public nuisance; but the danger from explosion is so great and imminent that it is necessary for the safety of the property of the plaintiffs, and the lives of themselves, their families, and workmen, and of the king's subjects passing along the highroad, that the court should immediately interfere.

The bill prayed an injunction; and a motion was made for that purpose, supported by affidavits of the facts stated by the bill.[1]

The Lord Chancellor. I incline to think that an injunction may be granted in this case upon the head, not of nuisance but of danger to property. In Robinson *v.* Lord Byron it appeared that the defendant sometimes withheld the water, and sometimes sent it down in quantities likely to sweep away the plaintiff's mills; and the injunction was from using the water in any other manner than it had been used before.

The injunction was from using the said new building or any other building adjoining thereto as a corning mill or corning house for the making of gunpowder, or as a storehouse or magazine for the depositing of gunpowder therein, until answer, or other order to the contrary.

Mr. Hart, *Mr. Leach*, *Mr. Heald*, and *Mr. Rose*, for the defendants, moved to dissolve the injunction.

The Lord Chancellor. The bill represents this building which the defendants are now erecting for the purpose of a corning-house as being in a situation rendering it a public nuisance, and a public nuisance combined with private injury to the plaintiffs, not only from that character but also from the manner in which it is constructed. I repeat now what I observed on a former occasion,[2] that great caution is required in granting an injunction of this nature where the effect will be to stop a large concern in a lucrative trade. In this instance, therefore, as in the former, I hesitated to grant it *ex parte*, giving an opportunity to oppose it on affidavit before I took any step. That, however, being declined, I granted the injunction on the affidavits *ex parte*, taking care to give the other parties the opportunity to file affidavits, answer, or demur.

Upon the question of jurisdiction, if the subject was represented as a mere public nuisance, I could not interfere in this case, as the Attorney-General is not a party; and, if he was a party, upon the *dicta*, unless it was clearly a public nuisance, generally the court would not

[1] The arguments of counsel and portions of the statement of the case and of the judgment are omitted. — Ed.

[2] Atty-Gen. *v.* Cleaver, 18 Ves. 217.

interpose by injunction until it had been tried at law. The complaint is therefore to be considered as of, not a public nuisance simply, but what, being so in its nature, is attended with extreme probability of irreparable injury to the property of the plaintiffs, including also danger to their existence; and on such a case, clearly established, I do not hesitate to say, an injunction would be granted.

The case being now brought here, the question is, whether upon all the affidavits the case is so clear that either upon the nature and construction of this building, or the site, or the conduct of the defendants, I can sustain this injunction without putting the question in a course of trial; and, if there ought to be a trial, whether I ought to sustain the injunction in the interval, or taking pledges from the defendants, let it go on until the determination whether it is a public nuisance; as, if it is not, it cannot be made out to be injurious to the property of the plaintiffs; the consequences producing that effect being such as must make it a public nuisance. The case is in some respects most embarrassing. The case of Robinson *v.* Lord Byron, which might be represented as somewhat novel, had a circumstance that distinguished it from this; that was not a case in which Lord Byron had done nothing exposing him to an action for damages, or the act done could be regarded as one that might, or might not, depending on the event of farther acts, be injurious to the plaintiffs: there was an action then depending for what had been done already. The court therefore imposed upon them the necessity of going speedily to trial of that action, maintaining the injunction in the mean time and providing against delay; and, the right being established, the injunction was made perpetual. Here no actual injury has accrued to the plaintiffs, but it is to be represented that it may accrue, and the misfortune is that it may be of such a nature that in one view it may be utterly irreparable; and it is not therefore a case where the party may have an action; but the court is to say instantly it is so dangerous that it shall not go on.

Upon the whole the proper course is that the plaintiffs shall indict this building as a nuisance; and the defendants shall plead without traversing: so that it may be tried at the next assizes; and put the concern in such circumstances that it may be carried on without imminent danger. If they will undertake to carry it on so that no more powder shall be kept there than is necessary for the purpose of carrying on the trade, with liberty to apply upon the result of the trial, that appears to be the best way to dispose of this case.

The order was made accordingly; and upon a suggestion that 1200 weight of gunpowder was necessary for the purpose of carrying on the trade, the defendants were directed to state particularly what was the least quantity they would have in the corning-mill during the interval until the assizes.

TURNER *v.* MIRFIELD.

BEFORE SIR JOHN ROMILLY, M. R., MARCH 2, 1865.

[34 *Beavan*, 390.]

THE object of this suit was to restrain a nuisance affecting the plaintiffs' property.

The defendant was the owner of a worsted mill near the plaintiffs' property. The nuisance complained of was of the following nature: — In the process of cleaning worsted before manufacturing it, it is washed with soap and caustic alkali, and the liquid used in such washing is afterwards curdled by mixing oil of vitriol with it. By these means, the greasy portion is caused to rise to the surface and is taken off, and the remainder of the liquid is refuse, and contains offensive substances, which emit a very strong and unwholesome stench, injurious to animals and men.

The defendant, in February, 1864, commenced draining this liquid into an old coal-pit on his lands, about forty yards from the plaintiffs' land, and it found its way under ground into the plaintiffs' colliery, and caused sickness to the men and boys there, and seriously injured their health. It was first observed about the 15th of February, and a correspondence took place between the parties, which commenced on the 2d of May, and ultimately this suit was instituted, on the 25th of June, 1864, praying an injunction to restrain the defendant "from transmitting or allowing to flow from his mill into the plaintiffs' land, or the mines in or under such land, the refuse fluid from his mill or any part of it, or any other water or fluid containing any filthy, noxious, or offensive substance or materials."

The existence of the nuisance was, in the opinion of the court, established.

THE MASTER OF THE ROLLS.

In defence, it is said, on behalf of the defendant, that the utmost that the court can now do is, to direct an issue, and that the court must either direct an issue to try whether there is a nuisance, or it must hear additional evidence, and determine the question of fact. I dissent from that argument, for I am of opinion that it is not necessary to adopt that course, except when there is some doubt on the mind of the court as to the fact; but here I am satisfied that there is a nuisance, and that the plaintiffs are entitled to have it stopped.[1]

[1] The old rule that the plaintiff must succeed in an action at law before he can obtain a permanent injunction against a nuisance was recognized in Att'y.-Gen. *v.* United Co., 30 Beav. 287; White *v.* Cohen, 1 Drew. 312; Imperial Co. *v.* Broadbent, 7 H. L. C. 600, 606, 612; and Att'y.-Gen. *v.* United Co., 8 Jur. N. S. 583, 31 L. J. Ch. 329 S. C.

But the modern English doctrine accords with the judgment of Sir John Romilly in the principal case.

Att'y.-Gen. *v.* Proprietors, L. R. 2 Ex. 71; Inchbald *v.* Robinson, 4 Ch. 388; Roskell *v.* Whitworth, 19 W. R. 804; Clowes *v.* Staffordshire Co., 8 Ch. 125, 142; Ball *v.* Ray, 8 Ch. 467, 472.

In Inchbald *v.* Robinson, *supra*, Selwyn, L. J., said, p. 395: "The court may, if it thinks

It is alleged that the plaintiffs are not entitled to any injunction, because the bill was not filed until six months after the nuisance was perceived. This delay would be very material, in the case of an inter-

fit, send the question of nuisance to be tried by a jury, but it is not bound to do so, and if the evidence is clear, the duty of the court is to dispose of the case at once." In the same case, p. 397, Giffard, L. J., expressed himself as follows: "However the matter may have stood before the passing of Sir John Rolt's Act, I am of opinion that the court must now deal with the question of nuisance or no nuisance in the same manner as it deals with any other question within its jurisdiction depending on a disputed matter of fact."

The modern rule is put very clearly by Bacon, V. C., in Roskell *v.* Whitworth, 19 W. R. 804, 806: "I have no doubt that, at all events, the court being satisfied of the existence of a nuisance which it has the power to abate or redress, whether public or private, has not hesitated — I may say could not in justice and reason hesitate — to exercise its jurisdiction and authority. But, if any doubt could exist on that subject, such doubt must be wholly removed and extinguished since the passing of the two recent statutes which are called by names familiar to us all — I mean Lord Cairns' and Sir John Rolt's Acts, 21 and 22 Vict. c. 27, and 25 and 26 Vict. c. 42. I conceive it to be the clear paramount duty of the court, not less in obedience to the statutory enactments than to the dictates of good sense and justice (which is the perfection of good sense) to decide at once any question for the decision of which it has satisfactory materials, without sending the parties litigant to some foreign extramural tribunal, there to undergo the dilatory, expensive, uncertain hazards of an inquiry which this court possesses the full means of deciding, and which the statute has said, in terms unmistakable, that it is the duty of this court to decide."

In the United States, if the plaintiff's right and the defendant's wrong are clear, equity will grant a permanent injunction against a nuisance without a prior action at law. Pa *v.* Wheeling Co., 13 How. 518; Webb *v.* Portland Co., 3 Sumn. 190; Carmichael *v.* Texarkana Co., 94 Fed. R. 561, 116 Fed. R. 845 (*semble*); Hagge *v.* Kansas Co., 104 Fed. R. 391 (*semble*); Nininger *v.* Norwood, 72 Ala. 277; (but in Rosser *v.* Randolph, 7 Port. 238 and English *v.* Progress Co., 95 Ala. 259, injunctions were denied because the plaintiff at a slight expense might have avoided the effects of the defendant's tort); Wahle *v.* Reimbach, 76 Ill. 322; Dwight *v.* Hayes, 150 Ill. 273; Kewanee *v.* Otley, 204 Ill. 402; Deaconess Home *v.* Bontjes, (Ill. 1904) 69 N. E. 748; Westbrook Co. *v.* Warren, 77 Me. 437, 443 (*semble*); Merrifield *v.* Lombard, 13 All. 16; Woodward *v.* Worcester, 121 Mass. 245; White *v.* Forbes, Walk. Mich. 112; Learned *v.* Hunt, 63 Miss. 373; Hayden *v.* Tucker, 37 Mo. 214; Baker *v.* McDaniel, (Mo. 1903) 77 S. W. 531; Wason *v.* Sanborn, 45 N. H. 169 (*semble*); Franklin *v.* Durgee, (N. H. 1901) 50 Atl. R. 911; Shields *v.* Arndt, 4 N. J. Eq. 234; Holsman *v.* Boiling Spring Co., 14 N. J. Eq. 335; Carlisle *v.* Cooper, 21 N. J. Eq. 576, 18 N. J. Eq. 241; Beach *v.* Sterling Co., 54 N. J. Eq. 65; Gardner *v.* Trustees, 2 Johns. Ch. 162; Belknap *v.* Belknap, 2 Johns. Ch. 463; Olmstead *v.* Loomis, 9 N. Y. 423; Att'y.-Gen. *v.* Blount, 4 Hawks. 384; Att'y.-Gen. *v.* Hunter, 1 Dev. Eq. 12; Hacke's App., 101 Pa. 245 (*semble*); Vaughn *v.* Law, 1 Humph. 123, 134; Wall *v.* Cloud, 3 Humph. 181; Weakley *v.* Page, 102 Tenn. 178; Pence *v.* Bryant, (W. Va. 1903) 46 S. E. R. 275.

If, however, either the plaintiff's right or the defendant's wrong is doubtful, a permanent injunction will be refused, in most states, until the plaintiff has succeeded in an action at law. Irwin *v.* Dixie, 9 How. 10 (*semble*); Parker *v.* Winnipiseogee Co., 2 Black, 545, 1 Cliff. 247; Consol. Co. *v.* Mesa Co., 177 U. S. 296; St. James Church *v.* Arrington, 36 Ala. 546; English *v.* Progress Co., 95 Ala. 259; Dunning *v.* Aurora, 40 Ill. 481; Bliss *v.* Kennedy, 43 Ill. 67; Lake View *v.* Letz, 44 Ill. 81; Nelson *v.* Milligan, 151 Ill. 462; Morse *v.* Machias Co., 42 Me. 119; Bartlett *v.* Moyers, 88 Md. 715; Dana *v.* Valentine, 5 Met. 8; Ingraham *v.* Dunnell, 5 Met. 118; Ronayne *v.* Loranger, 66 Mich. 373; Gwin *v.* Melmoth, Freem. (Miss.) 505; Green *v.* Lake, 54 Miss. 540 (*semble*); Harrelson *v.* Kansas Co., 151 Mo. 482; Burnham *v.* Kempton, 44 N. H. 78; Eastman *v.* Amoskeag Co., 47 N. H. 71; Perkins *v.* Foye, 60 N. H. 571; Stevens *v.* Paterson Co., 20 N. J. Eq. 126; Att'y.-Gen. *v.* Steward, 20 N. J. Eq. 415; Van Bergen *v.* Van Bergen, 3 Johns. Ch. 282; Reid *v.* Gifford, 6 Johns. Ch. 19, Hopk. Ch. 416; Ellison *v.* Commissioners, 5 Jones Eq. 57 (but see Clark *v.* Lawrence, 6 Jones Eq. 83); McCord *v.* Iker, 12 Oh. 387; Bunnell's App., 69 Pa. 59; New Castle *v.* Raney, 130 Pa. 546; Mowday *v.* Moore, 133 Pa. 598; Mirkil *v.* Morgan, 134 Pa. 144; Wood *v.* McGrath, 150 Pa. 451; Biddle *v.* Ash, 2 Ashm. 211; Hieskell *v.* Gross, 7 Phila. 317; Kennerty *v.* Etiwan Co., 17 S. Ca. 411 (*semble*); Caldwell *v.* Knott, 10 Yerg. 209; Kirkman *v.* Handy, 11 Humph. 406; Lassater *v.* Garrett, 4 Baxt. (Tenn.) 368; Powell *v.* Bentley Co., 34 W. Va. 804; Sheboygan *v.* Sheboygan Co., 21 Wis. 667.

In New York, however, even a doubtful case may be decided in the plaintiff's favor

locutory application for an injunction, but it cannot have any bearing at the hearing of the cause. The plaintiffs are not applying for an interlocutory injunction, and they are entitled, at the hearing, to have their property protected for the future.

It is also objected, that there is some evidence to show that the suit is got up by Colonel Tempest (a neighboring proprietor who had been affected by the nuisance), who, it is said, has indemnified one of the plaintiffs, and there is some proof of actual coöperation of Colonel Tempest. I am of opinion that although that were established, it cannot bar the plaintiff from his right to have the nuisance discontinued.

The plaintiffs are entitled to a perpetual injunction in the terms of the prayer of their bill.

JOHN J. CRONIN *v.* CHARLES B. BLOEMECKE AND OTHERS.

BEFORE JOHN R. EMERY, ESQ., V. C., JUNE 8, 1899.

[58 *New Jersey Equity Reports*, 313.]

ON application for preliminary injunction. Heard on bill and affidavits and answer and affidavits.

EMERY, V. C. The bill is filed to enjoin a nuisance alleged to result from the playing of the game of base ball in the grounds known as

without a prior action at law. Corning *v.* Troy Factory, 40 N. Y. 191; Campbell *v.* Seaman, 63 N. Y. 568; Pollitt *v.* Andrews, 58 Barb. 20.

In Maine the plaintiff's right must be established, either by a judgment at law or by long usage, to justify a permanent injunction. Porter *v.* Witham, 17 Me. 292; Jordan *v.* Woodward, 38 Me. 423; Varney *v.* Pope, 60 Me. 192; Rockland *v.* Rockland Co., 86 Me. 55; Tracy *v.* LeBlanc, 89 Me. 304.

If the determination of the doubtful right of a plaintiff depends upon the construction of documents, equity will decide the case without a preliminary action at law. Lyon *v.* McLaughlin, 32 Vt. 423. See *supra*, 515, n. 2.

It is not from lack of legitimate power, but from a supposed expediency, that equity in most of the states refuses a perpetual injunction against a nuisance, without an action at law, whenever the right of the plaintiff or the wrong of the defendant is doubtful.

Accordingly, the objection that the plaintiff has not made out his case at law cannot be taken for the first time on appeal. Cleveland Co. *v.* Munsell, 192 Ill. 430; Wakeman *v.* Wilbur, 147 N. Y. 657; see *supra*, 515, n. 2.

Right to jury trial. — As in other equity suits, neither party can claim, as of right, a trial by jury. Tinson *v.* Wilson, 38 Ch. Div. 72; Jenkins *v.* Bushby, [1891] 1 Ch. 484 (*semble*); Evans *v.* Ross, (Cal. 1885) 8 Pac. R. 88; Mercer Co. *v.* Harrodsburg, 23 Ky. L. Rep. 1744, 66 S. W. R. 10 s. c.; Culbert *v.* Hall, 181 Mass. 24, 25 (explaining Harris *v.* Mackintosh, 133 Mass. 228).

If the plaintiff has established his case at law, his right to a permanent injunction to restrain the continuance of the nuisance is a matter of course. Rochdale *v.* King, 2 Sim. N. S. 78; Imperial Co. *v.* Broadbent, 7 H. L. C. 600; Proprietors *v.* Proprietors, 85 Me. 175; Bemis *v.* Upham, 13 Pick. 169; Hill *v* Sayles, 12 Cush. 454; Harper Co. *v.* Mountain Co., (N. J. Eq. 1903) 56 Atl. R. 297. And if an injunction has once issued, equity will decide, without sending the case again to law, whether the defendant has continued the nuisance in disobedience of the injunction. Carlisle *v.* Cooper, 21 N. J. Eq. 588.

The judgment at law against the plaintiff is conclusive, as to the facts involved in the decision, in a subsequent suit in equity between the same parties. Bierer *v.* Hurst, 162 Pa. 1. — ED.

the Shooting Park, in the borough of Vailsburgh, adjoining or near the city of Newark. The Shooting Park is located on Myrtle Avenue and Rodwell Avenue, extending about three hundred and fifty feet on Myrtle Avenue and a less distance on Rodwell Avenue. Complainant owns a lot, twenty-five by one hundred feet, on the corner of the two avenues, upon which lot is his dwelling-house, which has been occupied by himself and family for six years, his family consisting now of his wife, two small children, and his mother. The rear of complainant's lot (twenty-five feet) bounds on the park, but on the side of his lot towards the north another lot owned by one McAdam, fifty by one hundred feet, directly joins complainant and is unoccupied. The Shooting Park, as appears by the answer of the defendant Bloemecke, is in the possession and control of the Essex County Amusement Company, who use or control it as a place of recreation and amusement for pecuniary profit, and the defendant Bloemecke is the manager in charge of the park and the owner of the base ball business conducted by the Newark Base Ball Club, whose games at the park are alleged to create a nuisance to complainant and his family. The nuisances or annoyances to which complainant and his family are alleged to be subjected are several in number, some of them arising from the manner in which the games themselves are carried on upon the grounds. These are (1) the driving of the balls upon complainant's grounds and the consequent trespassing upon his grounds to recover the balls, by which his use of his grounds is rendered dangerous, his peace and quiet interfered with and his property destroyed; (2) the noise occurring in the game itself by the shouts of the players and spectators, and the loud, profane, and obscene language used by the players or spectators and audible at his residence, together with the noise of fights and brawls during the game. The third nuisance complained of is the collection of large numbers of idle and disorderly persons in the neighborhood of the grounds and of complainant's house while the games are in progress, which crowds, by their noise, vile language and behavior, disturb the peace and quiet of the neighborhood and subject complainant and other residents to insults and abuse if they venture from their homes.

The principal annoyance arises from the games which are carried on at the park on Sundays. The games commenced in April and are scheduled to continue during the season at intervals until after the 1st of September. Complainant's bill prays that the playing of the games may be altogether enjoined, and the present application is for a preliminary injunction to the same extent pending the final hearing.

Considering first the facts of the case as now presented by the *ex parte* affidavits on both sides, I think complainant has made out on the facts such a *prima facie* case of serious annoyance as entitles him to a proper protection against the continuance thereof pending the final hearing.

But this protection, if given, should not extend to an absolute restraint against playing the games of base ball upon the park. De-

fendants make out a case which at least entitles them, pending the hearing, to show that the games can be so conducted as not to unreasonably annoy complainant and his family. An interlocutory injunction should not go further than to restrain the defendants, pending the hearing, from using or permitting to be used the premises called the Shooting Park mentioned in the bill, or any part thereof for the purpose of base ball games, so that a nuisance may be occasioned to the annoyance and injury of the complainant and his family at his residence or premises mentioned in the bill, either by the driving or dropping of balls upon his premises, or by trespassing from the players or spectators of the games, or by profane or indecent language upon the grounds, or from idle or disorderly persons in the streets collected by the games.

An injunction *pendente lite* should not extend to the noises upon the grounds incident to the playing of the games in a lawful and orderly manner, such as shouts of applause, for as to these a question as to acquiescence of complainant is shown, which disentitles him to an interlocutory injunction, although it may not bar relief on final hearing. This acquiescence arises, first, from the fact that complainant appears to have, at one time, requested and secured some privileges in the erection by defendants of a fence upon their own grounds, which would enable him and his friends to witness the games from his premises; and second, because games have been going on for some time at the park (a year or more), and a delay in applying for injunction will prevent an injunction *pendente lite* against the mere noises incident to the games. And an injunction cannot extend to nuisances created by the use on the grounds of vile or indecent language which is not audible at complainant's residence, or the unlawful or disorderly sale of liquor upon the premises. Protection against these nuisances, if they exist, must be sought in other tribunals. The whole extent of equitable jurisdiction is the protection of a person's dwelling-house or home against nuisances upon other premises, of so serious a character as to render his life therein uncomfortable.

It is objected that inasmuch as the fact of nuisance is disputed, complainant is not, under the rule settled in the Coach Co. Case,[1] entitled to a preliminary injunction pending the hearing. But the jurisdiction of a court of equity in relation to protection of one's dwelling-house against nuisances which render it uncomfortable, stands upon a different basis from the kind of injury considered in the Coach Co. Case, and this right is one which has been constantly protected in this court by preliminary injunction in a proper case, even when the existence of the nuisance is disputed. Such injunctions were granted in Ross *v.* Butler;[2] Cleveland *v.* Citizens Gas Light Co.;[3] Meigs *v.* Lister,[4] and the general jurisdiction of equity to protect such rights is stated in Leonard *v.* Hart,[5] in which the above cases are cited with approval on this point.

[1] 2 Stew. Eq. 299. [2] 4 C. E. Gr. 294. [3] 5 C. E. Gr. 201. [4] 8 C. E. Gr. 199.
[5] 15 Stew. Eq. 416 (Court of Errors and Appeals, 1886).

And in the present case there are two circumstances which make the case as one proper for preliminary injunction — *first*, this injunction can be directed in a form which will not interfere with the games if lawfully carried on; and *second*, the protection to which complainant is entitled against the unlawful carrying on of games must be granted at once to be effectual, as the case could not be regularly heard before the close of the present base ball season.

Two other objections to the issuing of a preliminary injunction were raised. The first is the acquiescence of the complainant in the alleged nuisance by his request for facilities in viewing the games from his grounds, which facilities were for a time allowed him. I have indicated above my view of the extent to which this action, as well as his choice of location, should be considered in framing a preliminary injunction. The other objection which is urged specially against any injunction, based on the collection of disorderly persons outside of defendants' grounds, is that the nuisance is a public nuisance only, and cannot be reached by injunction at the suit of complainant. But the right to relief in behalf of one who suffers private injury or annoyance from that which is a public nuisance is well settled. The only question is as to the character of the relief or remedy, and the right to relief by injunction against the special nuisance to one's dwelling-house by reason of crowds of disorderly persons upon the highways, drawn there by entertainments given by a third person upon his own lands for pecuniary profit, is based upon fundamental principles which have been recognized and enforced wherever they have been called in question. In Rex *v.* Moore [1] (which was an indictment), Lord Tenterden says: "If a person collects together a crowd to the annoyance of his neighbors, that is a nuisance for which he is answerable." In Walker *v.* Brewster [2] (where an injunction was granted), it was held that a case of nuisance was established by the collection of a crowd on the highways in the neighborhood of grounds upon which entertainments, with music and fireworks, were given continuously for profit. In Bellamy *v.* Wells,[3] cited in Barber *v.* Penley,[4] an injunction was granted against holding boxing or prize-fight entertainments, which had the effect of collecting large and noisy crowds in the streets outside of the premises.

I will advise a preliminary injunction in the form above indicated. The preliminary injunction will be granted upon the condition that if defendants desire to appeal from the order and file a notice of appeal within ten days, complainant shall consent to so speed the hearing of the appeal, by stipulations as to filing of answer or otherwise, as will enable the defendants to bring on the hearing of the appeal at the next term.[5]

[1] 3 Barn. & Ad. 184. [2] L. R. 5 Eq. 25. [3] 39 W. R. 158. [4] 2 Ch. 457, 458 (1893).

[5] Interlocutory injunctions were granted in the following cases: Mayor *v.* Bolt, 5 Ves. 129 (danger of making a house fall); Blakemore *v.* Glamorganshire Co., 1 M. & K. 154; Beaufort *v.* Morris, 6 Hare, 340; Pollock *v.* Lester, 11 Hare, 837 (brickburning); McMurray *v.* Cadwill, 5 Times L. R. 153, 183; Lambton *v.* Mellish, [1894] 3 Ch. 163 (noise); Att'y-Gen. *v.* Scott, [1904] 1 K. B. 404; First Bank *v.* Tyson, 133 Ala. 459 (obstruction of high-

EADEN *v.* FIRTH.

BEFORE SIR WILLIAM PAGE WOOD, V. C., JULY 20, 1863.

[1 *Hemming & Miller*, 573.]

THIS was a motion for injunction. The plaintiff was a house-owner at Sheffield, and the defendants were manufacturers of steel there, who had recently erected an enormous steam hammer on premises adjoining the plaintiff's house. The plaintiff produced evidence to show that the inmates of his house could not sleep in consequence of the noise and rocking produced by the hammer, and he moved for an injunction to restrain the nuisance.

The VICE-CHANCELLOR asked Sir *Hugh Cairns* whether he desired to have the question tried by a jury.

Sir *Hugh Cairns*. Certainly.

VICE-CHANCELLOR SIR W. PAGE WOOD. There is a very serious question to be tried in this case; and I certainly should not determine it without giving the defendant, as he desires it, the opportunity of taking the opinion of a jury upon the point. I do not say that there is no case in which this court would act at once; if I could see clearly, for instance, that there could be no possible defence, or if it were a case in which there was no conflict of evidence whatever, then, notwithstanding Lord Cottenham's well-known dictum, that there should be no perpetual injunction without an action, I should feel myself authorized to act at once without putting the parties to any further expense and delay.

Then, as soon as it is clear that an action (or what, but for the recent statute, would have been an action) is to be tried, the only remaining question is, whether the balance of convenience is in favor of or against the issue of an interlocutory injunction.

If I found any real apprehension of serious and immediate injury to health, or of any pressing character of the like nature (such as the cases of stench or of apprehended inundation), I would interfere to prevent such irreparable injury in the mean time; but in this case I see nothing except annoyance apprehended by the plaintiff: and I certainly think that on the question of balance of convenience I ought

way); Hobbs *v.* Amador, 66 Cal. 161 (pollution); Coker *v.* Birge, 9 Ga. 425; 10 Ga. 336 (livery stable); Atlanta *v.* Warnock, 91 Ga. 210 (noxious gas); So. Co. *v.* Bull, 116 Ga. 776; Wilson *v.* Eagleson, (Idaho, 1903) 71 Pac. R. 612 (diversion of water); People's Co. *v.* Tyner, 131 Ind. 275 (explosives); Lake Co. *v.* Young, 135 Ind. 426 (flooding); Ross *v.* Butler, 19 N. J. Eq. 294 (pottery works); Att'y-Gen. *v.* Steward, 20 N. J. Eq. 415 (pollution); Meigs *v.* Lister, 23 N. J. Eq. 196 (bone establishment); Fulton *v.* Greacen, 36 N. J. Eq. 216 (diversion); Colonial Co. *v.* Trenton Co., (N. J. Eq. 1903) 55 Atl. R. 993 (flooding); Arthur *v.* Case, 1 Paige, 447 (diversion); Catlin *v.* Valentine, 9 Paige, 575 (slaughter-house); Stevenson *v.* Pucci, 32 N. Y. Misc. Rep. 712 (blasting); Mooy *v.* Oley Co., 199 Pa. 152 (Electric R. R.); McGregor *v.* Camden, 47 W. Va. 193 (oil-well); McEldowney *v.* Lowther, 49 W. Va. 348 (telephone poles). — ED.

to refuse the injunction.[1] But for the operation of the recent act the proper course would have been to direct the motion to stand over, with liberty for the plaintiff to take such proceedings at law as may be required; and I will follow that course as nearly as the legislature will permit me to do, by ordering this motion to stand over till after the trial of the issue which I now direct.

Mr. Rolt urged, first, that I should decide this question myself without a jury; and, secondly, that if I required a jury I should summon one here before myself.

On the first point, I do not think that the act intended to introduce any alteration in the principles on which this court acts; and therefore I consider that the defendant is still entitled to carry his case to a jury in any instance in which he would, before that act, have been entitled to require the plaintiff to establish his right at law;[2] and accordingly I did not hear Sir Hugh Cairns on the merits of the case, so soon as I heard that he desired to go to an issue.

On the second point, I see no reason in a matter of this kind for withdrawing the question from the jury which would naturally have had to try it if the plaintiff had in the first instance gone to law, more especially as I know that Middlesex and London jurors complain very much, and not without reason, of the great amount of extra work which is thrown upon them by the practice of trying country causes in town. I will, therefore, direct an issue to be tried at whatever town on the northern circuit the parties may agree upon.

[1] Interlocutory injunctions against nuisances were refused in the following cases: Anon. Amb. 209; Grafton *v.* Hilliard, Amb. 160, n. 2, 4 DeG. & Sm. 326 n. s. c. (brick burning); Baines *v.* Baker, Amb. 158, 3 Atk. 750 s. c. (small pox hospital); Birch *v.* Holt, 2 Ves. 193, 3 Atk. 726 s. c. (*semble*); Att'y-Gen. *v.* Cleaver, 18 Ves. 211 (soap factory); Birmingham Co. *v.* Lloyd, 18 Ves. 515 (obstruction of water); Ripon *v.* Hobart, 3 M. & K. 169 (disturbance of navigation); Haines *v.* Taylor, 10 Beav. 75, 2 Ph. 209 (gas works); Elmhirst *v.* Spencer, 2 Mac. & G. 45 (pollution); White *v.* Cohen, 1 Drew. 312 (noise); Hawley *v.* Steele, 6 Ch. D. 521 (rifle-practice); Flint *v.* Russell, 5 Dill. 151 (stable); Amelia Co. *v.* Tenn. Co., 123 Fed. R. 811 (flooding); Middleton *v.* Franklin, 3 Cal. 238 (noise and vibration); Thebaut *v.* Canova, 11 Fla. 143 (noise and smoke); Mygatt *v.* Goetchins, 20 Ga. 350 (steam factory); Harrison *v.* Brooks, 20 Ga. 537 (stable); Thornton *v.* Roll, 118 Ill. 350 (flooding); Laughlin *v.* President, 6 Ind. 223 (obstruction of navigation); State *v.* Judge, 105 La. 731 (noise); Wason *v.* Sanborn, 45 N. H. 169 (flooding); Att'y-Gen. *v.* Steward, 20 N. J. Eq. 415 (slaughter-house); Lord *v.* Carbon Co., 38 N. J. Eq. 452 (flooding); Herbert *v.* Pa. Co., 43 N. J. Eq. 21 (embankment); Helmsley *v.* Bew, 53 N. J. Eq. 246 (wharf); DeCarvajal *v.* Y. M. C. A., 37 N. Y. Misc. Rep. 727 (electric plant); Fitz *v.* Erie Co., 155 Pa. 472 (electric railway); Heiskell *v.* Gross, 7 Phila. 317 (diversion); Williams *v.* Jones (S. Ca. 1902), 40 S. E. R. 881 (ginnery); Wingfield *v.* Crenshaw, 4 Hen. & Munf. 474 (dam); Radenhurst *v.* Coate, 6 Grant, Ch. 139 (soap factory). — Ed.

[2] But see *supra*, 558 n. 1.

ROBINSON *v.* LORD BYRON.

BEFORE LORD THURLOW, C., MAY 7, 1785.

[1 *Brown, Chancery Cases*, 588.]

MOTION for an injunction to restrain Lord Byron from preventing the water flowing to a mill which the plaintiffs used for a cotton manufacture, or letting a greater quantity of water than usual flow upon the mill.

The motion was before appearance, upon affidavits which stated that, since the 4th of April, Lord Byron, who had large pieces of water in his park, supplied by the stream which flowed to the mill, had at one time stopped the water, and at another time let in the water in such quantities as to endanger the mill; and the affidavits contained strong expressions of Lord Byron's, showing that his object in these proceedings was to obtain money from the plaintiffs.

LORD CHANCELLOR. The court will not restrain what has been enjoyed for twenty years past; but if what has been so enjoyed is used in a different way, so as to do mischief, the court may interpose. His Lordship accordingly ordered an injunction to restrain Lord Byron from using dams, weirs, shuttles, floodgates, and other erections, otherwise than he had done before the 4th of April, 1785.

Afterwards his Lordship altered the terms of the order, and added the words, "so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the 4th of April."

When the answer came in, it was insisted before the Master of the Rolls, sitting for Lord Chancellor, that the affidavits could not be read; but he was of a contrary opinion.[1]

1 Interlocutory mandatory injunctions were granted in the following cases: Hepburn *v.* Lordan, 2 H. & M. 345 (danger of fire from damp jute); Westminster Co. *v.* Clayton, 36 L. J. Ch. 476 (flooding); Ogletree *v.* McQuaggs, 67 Ala. 580 (stagnant pool); Cabbell *v.* Williams, 127 Ala. 320 (obstruction of highway).

They were withheld in the following cases: Anon., 1 Ves. Jr. 140 (ditch); Blakemore *v.* Glamorganshire Co., 1 M. & K. 154 (diversion); Att'y-Gen. *v.* Metrop. Board, 9 L. T. Rep. 139 (pollution).

In Blakemore *v.* Glamorganshire Co., *supra*, Lord Cottenham, C., said, p. 183: "The cases which seem to sanction an order for abating are very few, and in peculiar circumstances. An obstruction to the King's highway, or in a harbor which is *quasi* highway, has been ordered to be removed as a public nuisance, at the suit of the crown; as in the case mentioned by Lord Hardwicke (Ambler, 160), to have been decided in Lord King's time (a case relating to a street near the Exchange); and in the cases of the Bristol and Portsmouth harbors, and others in the Court of Exchequer. The East India Company *v.* Vincent, 2 Atk. 83, where Lord Harwicke decreed a wall to be pulled down, did not proceed upon the ground of nuisance, but agreement, and appears to have been, like Franklyn *v.* Tuton, 5 Mad. 469, not a case of injunction, but a decree on a bill for specific performance. On the other hand, in Ryder *v.* Bentham, 1 Ves. Sen. 543, Lord Hardwicke said he never had known an order to pull down made on motion, and but rarely by decree; and Lord Thurlow, in another case, 1 Ves. jun. 140, though pressed with the order made by himself in Robinson *v.* Lord Byron, 1 Bro. C. C. 588, and urged to direct that a ditch should be filled up, as well as the further digging restrained, would only grant the prohibiting part of the motion, and refused the ordering part. 'I do not,' said he, 'like granting

J. ROTHERY AND OTHERS *v.* THE NEW YORK RUBBER CO.

COURT OF APPEALS, NEW YORK, OCTOBER 10, 1882.

[90 *New York Reports*, 30.]

THIS action was brought to compel defendant to lower its dam, which the complaint alleged it had wrongfully and without authority erected to such a height that it set back the water of the stream upon plaintiffs' lands and mill thereon, and also to recover damages.

The trial court found that the dam was erected fifteen inches higher than defendant had a right to build it, and directed that it be lowered that much, and also gave $50 damages. The extra allowance granted was based upon the value of plaintiffs' premises.

these injunctions on motion. This ditch may be a mile long. Take an order that he shall do nothing more till answer, or further order.' This brings us then to Lane *v.* Newdigate, 10 Ves. 192, which may be said to go to the very uttermost verge of all the former cases and indirectly to order something to be done, by restraining the party from continuing to keep certain works out of repair. This case appears to have been *ex parte*, and not at all argued. Lord Eldon himself suggested the difficulty of making an order that the repairs should be done. Sir Samuel Romilly said it was no more, in effect, than Lord Thurlow had ordered in Robinson *v.* Lord Byron; but Lord Eldon appears to have thought otherwise, and he refused the order as prayed, directing it, however, in such a manner as to produce the same result, by making it 'difficult,' his Lordship said, 'for the defendant to avoid completely repairing the works.'

"I take leave to agree with Lord Lyndhurst in the opinion that if the court has this jurisdiction, it would be better to exercise it directly and at once; and I will further take leave to add, that the having recourse to a roundabout mode of obtaining the object, seems to cast a doubt upon the jurisdiction. But Robinson *v.* Lord Byron affords very little countenance to the general proposition; for the injunction issued only a month after the alleged nuisance, and that nuisance was of a varying nature, not the erection of works always producing one effect, but a contrivance by which the defendant sometimes stopped the water, and at other times over-flooded and endangered the mill, saying, that his 'object in doing so was to extort money from the plaintiff.' The order of the court was to restrain him from 'maintaining and using his shuttles, floodgates, erections, and other devices, so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the 4th of April, 1785,' the order being made on the 7th of May. When we find these two cases so peculiarly circumstanced; and especially that, in the one confessedly coming nearest the point sought to be attained by the present plaintiff, Lord Eldon felt the difficulty so insurmountable, that he could not get over it, but went as it were round it; although we have no right to say there is not a precedent for taking a similar course here, yet surely we may pause; and, without denying the jurisdiction, decline to exercise it.

"In the circumstances of the present case, too, there are additional reasons for coming to this determination, to say nothing of the time that has elapsed, and the works that have been constructed; and even if it should be granted that no laches can be imputed to the plaintiff, inasmuch as the pendency of the proceedings in other courts prevented him from applying here, still I cannot lay out of view the possible, and not remotely possible consequences of an order, which should compel the defendants either to suspend their navigation altogether, or to restore their works, if that were practicable, to the state and condition in which they were many years ago. Such considerations influenced the court in The Attorney-General *v.* Cleaver, where they existed in a very inferior degree.

"The leading principle then on which I proceed in dealing with this application, the principle which, as I humbly conceive, ought, generally speaking, to be the guide of the court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur, is, that only such a restraint shall be imposed as may suffice to stop the mischief complained of, and where it is to stay further injury, to keep things as they are for the present."

PER CURIAM.[1] It was conceded by the defendant on the trial that its dam set back the water on the plaintiffs' mill, and no prescriptive or other right to flow the plaintiffs' premises is claimed. The only controverted question was one of fact, as to the extent of flowage caused by the dam. The trial judge found that the dam was fifteen inches higher than it should be, having reference to the plaintiffs' rights. This was equivalent to a finding that the dam raised the water fifteen inches on the plaintiffs' premises. It is insisted that there was no evidence that a flowage to that extent was caused by the dam, and this is the main point presented by the defendants' appeal. We think the point is not tenable. . . . There is no objection to the form of relief given by the judgment. It having been determined that the erection and maintenance of the dam at its present height was unauthorized, and an invasion of the plaintiffs' rights, the court was authorized to render a mandatory judgment, requiring the defendants to lower the dam.[2] Hammond *v.* Fuller;[3] Corning *v.* The Troy Iron & Nail Factory.[4]

The judgment and order should be affirmed, without costs to either party on this appeal.

All concur, except Tracy, J., absent.

Judgment and order affirmed.

[1] Only a portion of the opinion of the court is given. — ED.

[2] Permanent mandatory injunctions were granted in the following cases: Nininger *v.* Norwood, 72 Ala. 277 (flooding); Demopolis *v.* Webb, 87 Ala. 659 (fence); Whaley *v.* Wilson, 112 Ala. 627 (fence); Richards *v.* Daugherty, 133 Ala. 569 (mill pond); Draper *v.* Mackey, 35 Ark. 497 (fence in highway); Learned *v.* Castle, 78 Cal. 454 (flooding); Hargro *v.* Hodgdon, 89 Cal. 623 (obstruction in highway); Barneich *v.* Mercy, 136 Cal. 207 (diversion); Goodrich *v.* Ga. Co., 115 Ga. 340 (diversion); Turpin *v.* Dennis, 139 Ill. 274 (fence in highway); Baumgartner *v.* Bradt, (Ill. 1904) 69 N. E. R. 912 (diversion); Kaufman *v.* Stein, 138 Ind. 49 (wooden building); Troe *v.* Larsen, 84 Iowa, 649 (dam); Snyder *v.* Fort Co., 105 Iowa, 284 (obstruction in highway); Rand Co. *v.* Burlington, (Iowa, 1904) 97 N. W. R. 1096 (sewers); Reese *v.* Wright, (Md. 1904) 56 Atl. R. 976; Att'y.-Gen. *v.* Williams, 174 Mass. 476 (Westminster Chambers case); Wilmarth *v.* Woodcock, 58 Mich. 482, 66 Mich. 331 (projecting cornice); Turner *v.* Hart, 71 Mich. 128 (dam); Burke *v.* Smith, 69 Mich. 380 (spite fence); Flaherty *v.* Moran, 81 Mich. 52 (spite fence); Kirkwood *v.* Finegard, 95 Mich. 543 (spite fence); Peck *v.* Roe, 110 Mich. 52 (spite fence); Pascagoula Co. *v.* Dixon, 77 Miss. 587 (obstruction of navigation); Horan *v.* Byrnes, (N. H. 1903) 54 Atl. R. 945 (spite fence); Earl *v.* De Hart, 12 N. J. Eq. 280 (obstruction in stream); Longwood Co. *v.* Baker, 27 N. J. Eq. 166 (flooding); Bailey *v.* Schnitzius, 45 N. J. Eq. 178 (reversing, 40 N. J. Eq. 247 — obstruction in stream); Schnitzius *v.* Bailey, 48 N. J. Eq. 409 (like preceding case); Corning *v.* Troy Co., 40 N. Y. 191 (diversion); Smith *v.* Rochester Co., 38 Hun, 612, affirmed 104 N. Y. 674 (diversion); Gilzinger *v.* Sangerties Co., 66 Hun, 173, affirmed 142 N. Y. 633 (diversion); Amsterdam Co. *v.* Dean, 162 N. Y. 270, 13 N. Y. Ap. Div. 42 (diversion); Ackerman *v.* True, 175 N. Y. 353 (obstruction in highway); Crocker *v.* Manhattan Co., 61 N. Y. Ap. Div. 226 (projecting shutters); Callen *v.* Electric Co., 66 Oh. St. 166 (electric light poles); Schaef *v.* Cleveland Co., 66 Oh. St. 215 (electric light plant); Lake Co. *v.* Elyria, (Ohio, 1904) 69 N. E. 738 (obstruction in highway); Willamette Works, 26 Oreg. 224 (changing grade of street); Burwell *v.* Hobson, 12 Gratt. 322 (dike); Clifton *v.* Weston, (W. Va. 1903) 46 S. E. R. 360 (obstruction in highway); Wauwatosa *v.* Dreutzer, 116 Wis. 117 (fence in highway).

Permanent mandatory injunctions against nuisances were refused, on the balance of convenience, in Att'y-Gen. *v.* Ely, 6 Eq. 106 (obstruction in highway); Wahl *v.* Cemetery Association, 197 Pa. 197 (cemetery). — ED.

[3] 1 Paige, 197.

[4] 40 N. Y. 192.

SWAINE *v.* THE GREAT NORTHERN RAILWAY CO.

Before Sir G. J. Turner and Sir J. L. Knight Bruce, L. JJ., January 26, 1864.

[4 *De Gex, Jones & Smith*, 211.]

This was an appeal by the plaintiff from the dismissal of his bill with costs by his Honor the Vice Chancellor Wood.

The case made by the bill was in substance as follows: —

The appellant owned a house and land at Stevenage, which was approached by a road adjoining a siding on the respondents' railway at the Stevenage station. The siding had been constructed in 1859 on land belonging to the respondents, and it abutted on the above-mentioned road, contiguous to and fronting the appellant's property. It had originally been used by the respondents for discharging the contents of their wagons, and for some time past has been used by them for discharging from their trucks and wagons large quantities of dung and other manure, which, after being discharged, were carted away without causing any very considerable inconvenience or annoyance to the appellant.

The respondents had subsequently commenced the practice of depositing and stacking the said manure and other offensive matter brought by trucks on to the siding, and allowing the same to remain so deposited or stacked for a considerable time; and at other times they had allowed the trucks to remain loaded for some weeks on the siding.

The contents of the deposited stacks or heaps of manure, or of the undischarged trucks, were stated to be different sorts of animal dung, decomposed fish, dogs, cats, and almost every species of decomposed animal matter; and the bill alleged that the consequent noisome effluvium was so bad as to render the occupation or enjoyment of the appellant's property impossible, without the greatest discomfort, inconvenience, and danger to health.

The bill prayed (1) for an injunction restraining the defendants from so using the siding as to cause any noxious, offensive, or unhealthy fumes, vapors, or stenches to interfere with the wholesome enjoyment of the appellant's premises and (2) for damages.[1]

The Lord Justice Turner.

Upon the facts of this case there are two points — first, whether the appellant is entitled to an injunction; and secondly, whether, if not entitled to an injunction, he is entitled to damages in this court.

I do not understand it to be contended that, if the manure was brought to the station in a proper manner, and was properly dealt with when there, the appellant would have a case for the interference

[1] The statement of the case is abridged and the arguments are omitted. — Ed.

of the court. The case made by the bill and argued at the bar is this: first, that the manure was not proper manure, and secondly, that it was not removed from time to time as often as it ought to have been removed.

Upon the evidence, it cannot be denied that in some instances dead dogs and cats have got into this manure, that occasionally the manure which was carried was not proper manure. Nor can it be denied that in some instances the manure has remained at the station longer than it ought to have remained. The manure is brought down; the farmer does not send for it on the day it arrives. It must be emptied out of the trucks, and deposited in some place or other.

But the real question is, whether there has been such a continued system of carrying manure of a description not proper to be carried, and therefore prejudicial to the appellant, and such a continued system of keeping manure at the station beyond the time necessary or proper for disposing of it, as to induce the court to interfere by injunction.

With reference to this point, and adhering to the opinion expressed by both Lord Cranworth and myself in the case of The Attorney-General *v.* The Sheffield Gas Company,[1] that it is not in every case of nuisance that the court will interfere by injunction; and holding that occurrences of nuisances, if temporary and occasional only, are not grounds for the interference of this court by injunction, except in extreme cases, there is not in my judgment here a sufficient case for such interference.[2]

Then, as to the question of damages, a question which we had to consider also in Johnson *v.* Wyatt.[3]

The law upon the point stands thus: According to Sir Hugh Cairns' act the court has jurisdiction to give damages in any case where a bill is properly filed in this court. I do not think, however, that Mr. Rolt's act makes it compulsory upon the court so to do; the case, therefore, stands in this position, that we have power to give damages, but are not compelled to do so.

Looking then to the nature of the present case, it is not a case in which we should, in my judgment, be well advised to go into the question of damages.

The bill must be dismissed, as was the bill in Johnson *v.* Wyatt, though not exactly on the same grounds, for there we were of opinion that the appellants were not entitled to damages at all. We do not say that here. But the case could be more effectually disposed of in a court of law than in a court of equity, which has been placed by Mr. Rolt's act in the sometimes difficult position of being compelled to

1 3 De G., M. & G. 304.

2 Att'y-Gen. *v.* Sheffield Co., 3 D. M. & G. 304 (disturbance of franchise); Goldsmid *v.* Tunbridge Wells, L. R. 1 Eq. 349, 354 (*semble*); Att'y-Gen. *v.* Cambridge Co., 4 Ch. 71 (disturbance of franchise); Cooke *v.* Forbes, 5 Eq. 166; Hagge *v.* Kansas Co., 104 Fed. R. 301 (*semble*); Nelson *v.* Milligan, 151 Ill. 462; Blaine *v.* Brady, 64 Md. 373; Kenney *v.* Consumers Co., 142 Mass. 417 *Accord.* — Ed.

3 2 De G., J. & S. 18.

decide questions of fact either on insufficient statements contained in affidavits or else by examination of all the witnesses before itself.[1]

The dismissal of the bill should, in order that no argument may be raised upon the facts, as though the question of damages was thereby concluded, be expressed to be without prejudice to the right of the appellant to bring such action as he may be advised. It should also be without costs; and if any costs have been paid under the decree they should be returned. There will be no costs of the appeal.

The Lord Justice Knight Bruce.

I agree.

[1] *Compensation in equity for a nuisance.* — If the plaintiff establishes his right to a permanent injunction against the continuance of a nuisance, he may recover, in the same suit, compensation for damage suffered up to time of decree. Hunt *v.* Peake, Johns. 705; Ball *v.* Ray, 8 Ch. 467; Pennington *v.* Brinsop Co., 5 Ch. D. 769; Hole *v.* Chard Union, [1894] 1 Ch. 293; Tyler *v.* Wilkinson, 4 Mas. 397; Carmichael *v.* Texarkana, 94 Fed. R. 561 (*semble*); Farris *v.* Dudley, 78 Ala. 124; Whaley *v.* Wilson, 112 Ala. 627; Courtwright *v.* Bear Co., 30 Cal. 573; Yolo Co. *v.* Sacramento, 36 Cal. 193; Weston Co. *v.* Pope, 155 Ind. 394; Tron *v.* Lewis, (Ind. App. 1903) 66 N. E. R. 490; Whaley *v.* Keokuk Co., 63 Iowa, 680 (but by statute plaintiff entitled to have damages assessed by jury); Froehlicher *v.* Oswald Ironworks, (La. 1903) 35 So. R. 821; Reese *v.* Wright, (Md. 1904) 56 Atl. R. 976; Potter *v.* Howe, 141 Mass. 357 (*semble*); Gilbert *v.* Boak Co., 86 Minn. 365 (court went so far as to say that plaintiff must recover compensation in the equity suit, or forfeit all claim for past damages); Paddock *v.* Somes, 102 Mo. 226; Baker *v.* McDaniel, (Mo. 1903) 77 S. W. R. 531; Parker *v.* Laney, 58 N. Y. 469; Garwood *v.* N. Y. Co., 83 N. Y. 400; Flynn *v.* Taylor, 127 N. Y. 596; Hunter *v.* Manhattan Co., 141 N. Y. 281, 284; Gilzinger *v.* Saugerties Co., 66 Hun, 173, affirmed 142 N. Y. 633; Garvey *v.* Long Island Co., 159 N. Y. 323, 332; Bly *v.* Edison Co., 172 N. Y. 1; Ackerman *v.* True, 175 N. Y. 353; Davis *v.* Lambert, 56 Barb. 480; Pollitt *v.* Andrews, 58 Barb. 20; Hutchins *v.* Smith, 63 Barb. 251; Beir *v.* Cooke, 37 Hun, 38; Inderlied *v.* Whaley, 85 Hun, 63, affirmed, 156 N. Y. 658; Brown *v.* Ontario Co., 81 N. Y. Ap. Div. 273; Keppel *v.* Lehigh Co., 200 Pa. 649; Richi *v.* Chattanooga Co., 105 Tenn. 651; Comminge *v.* Stevenson, 76 Tex. 642; Winchell *v.* Waukesha, 110 Wis. 101.

But see *contra*, Stevenson *v.* Morgan, (N. J. Eq. 1902) 53 Atl. R. 677; Miner *v.* Nichols, 24 R. I. 199.

In Basey *v.* Gallagher, 20 Wall. 670, 680, Field, J., said, extra judicially, that the damages for a past nuisance must be assessed by a jury, although claimed in a suit for an injunction.

If the defendant at the time of bill filed was committing such a nuisance as to warrant the twofold relief of injunction and compensation, the plaintiff, being rightly in equity, may obtain the relief of compensation, even though, either by the termination of the plaintiff's interest in the property, or by the definitive discontinuance of the tort before decree, relief by injunction is no longer proper. Case *v.* Minot, 158 Mass. 577, 588, 589; Lexington Works *v.* Canton, 171 Mass. 414; Meyer *v.* Phillips, 97 N. Y. 485; Van Allen *v.* N. Y. Co., 144 N. Y. 174; Koehler *v.* N. Y. Co., 159 N. Y. 218; Miller *v.* Edison Co., 66 N. Y. Ap. Div. 470. (But see *contra*, McNulty *v.* Mt. Morris Co., 172 N. Y. 410, deciding that in such a case the action must be tried on the common law side of the court.)

If, however, at the time of bill filed, the plaintiff had no right to an injunction, he can get no relief in equity for the antecedent damages caused by the nuisance. Ackerman *v.* True, 56 N. Y. Ap. Div. 54.

If, after an appeal from a decree for an injunction, and before the appeal is argued, circumstances change so that an injunction is no longer admissible, the defendant is still entitled to a decision as to the propriety of the decree appealed from. Inchbald *v.* Robinson, 4 Ch. 388. But see *contra*, Davis *v.* Boyer, (Iowa, 1904) 97 N. W. R. 1002, in which case the court declined to entertain a plaintiff's appeal under similar circumstances. — Ed.

PRESTONIA MANN *v.* HARVEY WILLEY.

APPELLATE DIVISION, SUPREME COURT, NEW YORK, MAY, 1900.

[51 *New York Appellate Division Reports*, 169.]

PER CURIAM.[1] The plaintiff is a riparian owner upon the banks of a creek known as Gulf Brook. She complains that the defendant, who keeps a summer hotel located some fifty-four rods further up the stream, has polluted the water of such stream by discharging all the sewage from his hotel into it. She brings this action for a perpetual injunction against the defendant so discharging into the stream, and for damages for the injury already caused her.

The trial judge found, as a fact, that the discharge of such sewage into the stream rendered it impure and unwholesome, and that plaintiff's damage thereby is substantial, and ordered judgment for a perpetual injunction against the same. From the judgment entered thereon this appeal is taken.

The plaintiff has never, as yet, used the water from this stream for drinking, cooking, or other domestic purposes. The only use to which she seems to have ever put it is for bathing and driving a turbine wheel. And the defendant contends that for such purposes the water is in no way injured by the discharge of his sewage into the creek. Although there is some conflict of evidence on that question, we are inclined to think the weight of evidence is to the effect that, when the water reaches the plaintiff's premises, it does not appear either to the smell or the sight to be at all affected by the sewage, and if the right to the injunction depended entirely upon that question, we would hardly be inclined to sustain it. But that the discharge of such sewage into the stream does pollute and render it unfit for domestic purposes cannot be doubted, and is, we think, established by the evidence, and even though the plaintiff has not as yet put the water to such a use, she had the right to the stream in its natural purity. Townsend *v.* Bell,[2] Chapman *v.* City of Rochester.[3] And that right was not conditioned upon the beneficial user of it. N. Y. Rubber Co. *v.* Rothery.[4] And she was entitled to equitable relief against the defendant for interfering with it, though the damages were merely nominal. Amsterdam Knitting Co. *v.* Dean.

All concurred, except KELLOGG, J., not sitting.

Judgment affirmed with costs.[5]

[1] Only a portion of the opinion of the court is given. — ED.

[2] 62 Hun, 306; s. c., 42 App. Div. 409. [3] 110 N. Y. 273. [4] 132 N. Y. 293, 296.

[5] This decision was affirmed without opinion by the Court of Appeals, 168 N. Y. 664. Restrictive injunctions were granted in the following cases, although only nominal damages appeared. Norbury *v.* Kitchin, 15 L. T. Rep. 501 (diversion — plaintiff had a verdict at law for nominal damages); Clowes *v.* Staffordshire Co., 8 Ch. 125 (pollution); Wilts Co. *v.* Swindon Co., 9 Ch. 451, L. R. 7 H. L. 697 (diversion); Pennington *v.* Brinsop Co., 5 Ch. D. 769 (*semble* — pollution); Roberts *v.* Gwyrfai, [1899] 1 Ch. 583 (diversion); Webb *v.* Portland Co., 3 Sumn. 190 (diversion); Indianapolis Co. *v.* American Co., 53 Fed. R. 970, 975

AMSTERDAM KNITTING CO. *v.* LUTHER L. DEAN.

COURT OF APPEALS, NEW YORK, MARCH 27, 1900.

[162 *New York Reports*, 278.]

O'BRIEN, J. The parties to this action, respectively, own and operate mills upon the same stream or watercourse, the plaintiff being the lower and the defendants the upper proprietors. The plaintiff alleged that some time prior to the commencement of the action the defendants obstructed the stream by constructing an embankment across the natural channel and blasting out the bed of the stream adjoining their own premises, and so diverted the flow of the water from the course in which it was accustomed to flow. The referee found the facts in favor of the plaintiff, and the findings must be regarded as conclusive upon this appeal. There was a finding, however, that the damages sustained by the plaintiff in consequence of the acts complained of were nominal merely. It was decreed by the judgment entered on the report that the diversion of the stream in the manner found was unlawful as against the plaintiff and in violation of its right to have the water of the stream flow through its natural channel, and the defendants were forever enjoined and restrained

(*semble* — pollution); Pine *v.* Mayor, 103 Fed. R. 337 (diversion); Chestatee Co. *v.* Cavenders Co., (Ga. 1903) 45 S. E. R. 267 (diversion); Field *v.* Barling, 149 Ill. 556 (obstructing highway); Dwight *v.* Hayes, 150 Ill. 273 (pollution); Brookline *v.* Mackintosh, 133 Mass. 215, 224 (*semble* — pollution); Downing *v.* Elliott, 182 Mass. 28 (*semble* — if damages too small for injunction, too small for action also); Paddock *v.* Somes, 102 Mo. 226 (flooding prior judgment at law for plaintiff); Brown *v.* Ashley, 16 Nev. 311 (diversion); Smith *v.* Rochester, 38 Hun, 612, affirmed 104 N. Y. 674 (diversion); Gilzinger *v.* Saugerties Co., 66 Hun, 173, affirmed 142 N. Y. 633; Strobel *v.* Kerr Co., 164 N. Y. 303, 323 (*semble*); Mann *v.* Willey, 51 N. Y. Ap. Div. 169, 170, affirmed 168 N. Y. 664 (pollution); Townsend *v.* Bell, 62 Hun, 306, 42 N. Y. Ap. Div. 409 (pollution); Duester *v.* Johnstown, 24 N. Y. Ap. Div. 608 (diversion); Middlestadt *v.* Waupaca Co., 93 Wis. 1 (pollution).

But see *contra*, Watson *v.* New Milford Co., 71 Conn. 442; Laney *v.* Jasper, 39 Ill. 46; Owen *v.* Phillips, 73 Ind. 284 (*semble*); Dana *v.* Valentine, 5 Met. 8 (*semble*); Bassett *v.* Salisbury Co., 47 N. H. 426.

In Pennington *v.* Brinsop Co., *supra*, FRY, J., said, p. 773: "I shall not, of course, say that, in no case of injury to riparian rights damages should be awarded in lieu of an injunction, but I know of no case in which it has been done. In the case of Clowes *v.* Staffordshire Potteries Waterworks Company, L. R. 8 Ch. 125, the point was considered by Lord Justice Mellish, and although he was of opinion that in that case the plaintiff could only have recovered nominal damages, he nevertheless held that an injunction ought to issue, upon the ground of the inconvenience of leaving the parties to repeated and successive actions for damages. If, therefore, in the present case there had been no evidence of actual damage, but merely evidence of injury to the riparian and prescriptive rights of the plaintiffs, I should have followed this authority."

In Webb *v.* Portland Co., *supra*, STORY, J., said, p. 197: "If, then, the diversion of water complained of in the present case is a violation of the right of the plaintiffs, and may permanently injure that right, and become by lapse of time the foundation of an adverse right in the defendant, I know of no more fit case for the interposition of a court of equity, by way of injunction, to restrain the defendants from such an injurious act. If there be a remedy for the plaintiffs at law for damages, still that remedy is inadequate to prevent and redress the mischief. If there be no such remedy at law, then, *a fortiori*, a court of equity ought to give its aid to vindicate and perpetuate the right of the plaintiffs." — ED.

from continuing the obstruction and diversion, and ordered to remove the embankment described forthwith and to restore the stream to its natural course and level.

The contention of the learned counsel for the defendants is, that upon the findings the equitable relief granted was unauthorized and erroneous as matter of law. The only basis for this proposition is, that since the referee found that there was no substantial damage to the plaintiff, there was no power in the court to direct the removal of the obstruction or the restoration of the stream to its former condition. This contention cannot be sustained. It seems to be well settled that in such cases, where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction, though no actual damage is shown or found. Smith *v.* City of Rochester;[1] Webb *v.* Portland Mfg. Co.;[2] Corning *v.* Troy Iron and Nail Factory;[3] Gould on Waters, § 13; Angell on Watercourses, § 449.

Where the lands of the party complaining of such a diversion of running water include either the whole or a part of the natural channel, equity will enjoin the continuance of the unlawful act of the owner above and interfere by mandatory injunction to restore the stream to its original condition. The circumstance that the plaintiff in such a case has shown no actual damage is no answer to his application to have the water restored to its natural course. The case was correctly decided below, after a very full consideration of the law and the facts, and there is no ground upon which this court can properly interfere with the judgment, and it must, therefore, be affirmed with costs.

Parker, Ch. J., Gray, Haight, Cullen, and Werner, JJ., concur; Landon, J., not sitting.

Judgment affirmed.[4]

RICHARDS'S APPEAL.

Supreme Court, Pennsylvania, January 20, 1868.

[57 *Pennsylvania Reports*, 105.]

The opinion of the court was delivered, February 3, 1868, by Thompson, C. J.[5] The complainant in this case is the owner of a dwelling-house and cotton factory in the village of Phœnixville, Chester County; and the respondents are owners of very extensive

[1] 104 N. Y. 674. [2] 3 Sum. 189. [3] 40 N. Y. 191.

[4] Learned *v.* Castle, 78 Cal. 454 (obstruction in stream); Bickett *v.* Morris, L. R. 1 H. L. Sc. 47 (obstruction in stream); Hargro *v.* Hodgdon, 89 Cal. 623 (obstruction of highway); Proprietors *v.* Proprietors, 85 Me. 175 (but title had been established at law); Brown *v.* Ontario Co., 81 N. Y. Ap. Div. 273 (dam — compare Clinton *v.* Myers, 46 N. Y. 511) *Accord.* — Ed.

[5] Only the opinion of the court is given. — Ed.

iron works in the same village. The former complains that by reason of the kind of fuel used by the latter in their works, his residence is rendered uncomfortable and unwholesome, and his factory materially injured in the discoloration of his fabrics and deterioration of his machinery. Claiming that he had established this, he asked the court below for a perpetual injunction to restrain the respondents from using the fuel, bituminous and semi-bituminous coal, complained of as the cause of the injury to his property in these furnaces. The case was heard on bill and answer, and the court decided against him. He was then permitted to file a replication and take testimony, on which there is a report of a master also against him. The court having sustained the report, again refused to enjoin the defendants, and the case is before us on an appeal, and we are asked to do what the court below refused, namely, perpetually to restrain the defendants from using bituminous or semi-bituminous coal in their furnaces.

The defendants' works are very extensive, amongst the most so, it is said, of any of the kind in the Commonwealth, consisting of several blast furnaces, some seventy puddling furnaces, and rolling-mills and other machinery. They began on a small scale some forty-nine or fifty years ago, and up to 1840 used bituminous coal exclusively. The original works were not precisely on the spot of those complained of, but so near it as to entitle the latter to be regarded as an extension of the former. The extensions made in the works in 1837, 1846, and 1853, constitute the present works, the cost of which alone is represented as exceeding half a million of dollars, and which at the time of taking the testimony, and previously, employed, as the master reports, from eight hundred to one thousand hands.

The plaintiff's dwelling, it appears, is situated on a bluff or hill northwardly from the defendants' works, about seventy feet above the nearest furnace floor, which brings its first story about on a level with the top of the puddling-stacks; and when the wind is towards the plaintiff's house and from the furnace, the consequence is, that it is at times enveloped in a coal-smoke thrown out of the chimneys of the puddling furnaces. It cannot be doubted, I think, that this materially operates to injure the dwelling-house as a dwelling, and consequently to deteriorate its value. The alleged injury to the factory is mainly that the smoke and soot of the furnace blackens the stock and renders the fabrics less saleable. This I can readily understand and believe. The house was erected in 1829, and the factory in 1834, and both have been generally occupied ever since; the factory not doing full work for some time past, as the master reports.

A careful consideration of the testimony satisfies us that the use of semi-bituminous coal, the fuel complained of, is necessary to the successful manufacture of iron fit for axles, cannon, and the like, in the manufacture of which the defendants are largely engaged; that the process of manufacture, and fuel used, are generally employed in similar establishments, and that there was neither a negligent nor wilful infliction of injury upon the plaintiff or his property in the

defendants' mode of operating their works. Whatever of injury may have, or shall result to, his property from the defendants' works, by reason of the nuisance complained of, is such only as is incident to a lawful business conducted in the ordinary way, and by no unusual means. Still there may be injury to the plaintiff; but this of itself may not entitle him to the remedy he seeks. It may not, if ever so clearly established, be a case in which equity ought to enjoin the defendants in the use of a material necessary to the successful production of an article of such prime necessity as good iron; especially if it be very certain that a greater injury would ensue by enjoining than would result from a refusal to enjoin. If we were able with certainty to say that the use of semi-bituminous coal, in the process of making good iron by the puddling process, was unnecessary, and other fuel was equally good and available, or that by a reasonable expenditure of money on the works, all injury might be avoided, a different case might appear to our minds as chancellors, and we might then say that the cause of injury should cease, and that a decree in terms to meet such a contingency should be made so as to prevent the injury. But we have not such case before us. Bituminous, or at least semi-bituminous coal, we think, from the testimony, is necessary in the manufacture of iron, such as the business of the defendants requires, and whose fabrics the public require. Nor are we shown by testimony or reliable tests of any kind, that the smoke produced in the puddling process can be consumed, as it undoubtedly may be in ordinary chimneys, or when produced in furnaces used to propel machinery. I am personally cognizant that this may be done, from observation both in this country and in England; and I have therefore read with satisfaction and entire conviction of the truth, the article from the London Quarterly of 1866, so largely quoted by the learned counsel for the appellants; but I would be very unwilling to act on that conviction or that theory any further than to the extent to which experiment has gone. I would require very clear proof of the practicability of the application of the principle to uses dissimilar, or partially so, as puddling chimneys from common furnace smoke-stacks. The defendants seem willing to test the applicability of smoke consumers to puddling furnaces, and at the same time express their doubts in a practical shape by offering $50,000 for an invention which will consume the smoke of their puddling stacks without impairing the efficiency of the process of manufacturing iron. However this may be, certain it is, we are not able to say from anything shown, that the evil complained of can be remedied by the application of smoke consumers. We do not know what effect their application might have on the process; nor do we think we should visit the defendants, because they might be unwilling to add to the height of their chimneys without knowing what effect it would have, or because they might not be willing to tear down their establishment and re-erect it on Seiman's plan or patent. What effect these remedies, or either of them, ought to have on the mind of a chancellor, if feasible,

and the injury complained of were absolutely irreparable, we are not called upon to say, for such is evidently not the case here if there be any damage at all, as we shall presently show.

The rule on this subject is well stated in Grey *v.* The Ohio and Pennsylvania Railroad Co.,[1] thus: "Where damages will compensate either the benefits derived or the loss suffered from a nuisance, equity will not interfere." See also Hilliard on Injunc. 271; Adams' Eq. 485; Fonblanque's Eq. 51; 2 Story's Eq. § 925, *et seq.*; Eden on Injunc. 269. In Coe *v.* Lake,[2] it was said, where the bill prayed an injunction to suppress a nuisance to the plaintiff's land, it might be dismissed on general demurrer for want of equity, unless it appeared from the subject-matter affected by the alleged nuisance that there was danger of irreparable mischief, or of an injury such as could not be adequately compensated in a suit at law. These, and many other authorities to the same effect, some of which are on the paper-book of the appellees, prove conclusively that, as a general rule, mischief or damage is not irreparable which is susceptible of being compensated in damages. We have no doubt that an action at law will lie for an injury to property for causes similar to those mentioned in this bill, and if so, why will not the remedy be adequate in such case, and thus the injury be repaired in damages? We are not to presume that it will not be. This would be to impugn the justice of our common-law forms without a reason. We think, under the circumstances of the case, that the injunction ought to be refused, and the plaintiff left to his action at law for the recovery of such damages as he may have sustained or may sustain.

An error seems somewhat prevalent in portions, at least, of this Commonwealth, in regard to proceedings in equity to restrain the commission of nuisances. It seems to be supposed that, as at law, whenever a case is made out of wrongful acts on the one side and consequent injury on the other, a decree to restrain the act complained of, must as certainly follow, as a judgment would follow a verdict in a common-law court. This is a mistake. It is elementary law, that in equity a decree is never of right, as a judgment at law is, but of grace.[3] Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving the party to his redress at the hands of a court and jury. If in conscience the former should appear he will refuse to enjoin: Hiltio

[1] 1 Grant, 412.

[2] 37 N. H. 254.

[3] But in Pa. Co.'s Ap. 96 Pa. 116, 124, the court, when speaking of injunctions against nuisance, adopted this language of Earl, J., in Campbell *v.* Seaman, 63 N. Y. 568: "It was formerly rarely issued in the case of a nuisance until the plaintiff's right had been established at law, and the doctrine which seems now to prevail in Pennsylvania, that the writ is not a matter of right but of grace, to a large extent prevailed. . . . But a suit at law is no longer necessary, and the right to an injunction in a proper case in England and most of the states is just as fixed and certain as the right to any other provisional remedy. The writ can be rightfully demanded to prevent irreparable injury, interminable litigation, and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate jurisdiction. It is a matter of grace in no sense except that it rests in the sound discretion of the court." — Ed.

v. The Earl of Granville;[1] Grey *v.* The Ohio and Penna. Railroad Co., *supra*. We think this is a safe rule, and that the case we are considering is within it. With these views, and on full consideration of all the testimony in the case, we are of opinion the injunction was properly refused in the court below, and that the decree dismissing the plaintiff's bill with costs must be affirmed.

Appeal dismissed at the cost of the appellant.[2]

RICHARD HENNESSY *v.* CYRUS P. CARMONY AND WIFE.

NEW JERSEY, BEFORE HENRY C. PITNEY, V. C., OCTOBER, 1892.

[50 *New Jersey Reports, Equity*, 616.]

PITNEY, V. C. The object of the bill is to restrain a private nuisance.

The complainant is the owner of a small lot of land, about eighteen feet front and rear by about ninety-six feet deep, in the city of Camden, fronting on the west side of South Eighth Street, about midway between Spruce Street on the north and Cherry Street on the south. Upon this lot is situate a small dwelling-house, composed of a main or front part of brick about fifteen feet front by thirty feet deep, two stories high, leaving a passage-way of three feet on the northerly side, and having a wooden extension or kitchen about ten by thirty-five feet, two stories high, in the rear. The rear of this structure is thirty-one and a half feet from the rear line of the lot. The ground lying to the north and west of this lot is owned by the defendants, or one of them, and is used for a dye-works for coloring cotton and other materials. In the process of dyeing it, of course, becomes necessary to dry those materials, and in order to hasten this process use is made of two machines, called in the evidence "whizzers," into which the wet material is placed, and which, by being revolved at great speed, drive out the water by centrifugal force. These machines are driven by two small engines attached to them directly, without intermediate gearing, so that the engines must make the same number of revolutions as do the whizzers, and the more rapid the revolution the more

[1] 1 Craig & Ph. Ch. R. 292.

[2] Owen *v.* Phillips, 73 Ind. 284, 288 (*semble* — smoke of flouring mill); Fox *v.* Holcomb, 32 Mich. 494 (flooding); Big Rapids Co. *v.* Comstock, 65 Mich. 78 (*semble* — no mandatory injunction to remove encroaching building); Turner *v.* Hart, 71 Mich. 128, 139 (*semble* — flooding); Potter *v.* Street Co., 83 Mich. 285 (*semble* — conversion of horse R. R. to elevated R. R.); Dana *v.* Craddock, 66 N. H. 593, 595 (*semble* — obstruction of navigation); Goodall *v.* Crofton, 33 Oh. St. 271, 277 (*semble* — vibration from steam-engine); Wahl *v.* Cemetery Association, 197 Pa. 197, 209 (*semble* — cemetery) *Accord*.

In Alabama a plaintiff has been denied an injunction because he might at a slight expense avoid the mischievous consequences of the defendant's nuisance. Rosser *v.* Randolph, 7 Port. 238; English *v.* Progress Co., 95 Ala. 259. But this doctrine is repudiated in Paddock *v.* Somes, 102 Mo. 226; Masonic Association *v.* Bank, 94 Va. 695. — ED.

rapid the process of drying. The principal subject of litigation was as to the effect upon the complainant's premises of these machines.

[The discussion of the evidence is here omitted.]

The serious and troublesome question in the case is as to whether the vibration established is of such a degree as to entitle the complainant to the aid of this court.[1]

The familiar ground on which the extraordinary power of the court is invoked in such cases is that it is inequitable and unjust that the injured party should be compelled to resort to repeated actions at law to recover damages for his injury, which, after all, in this class of cases, are incapable of measurement; and I presume to add the further ground that in this country limiting the injured party to such remedy must result in giving the wrong-doer a power not permitted by our system of constitutional government, viz., to take the injured party's property for his private purposes upon making, from time to time, such compensation as the whims of a jury may give. This ground of equitable action is of itself sufficient in those cases where the injury, though not irreparable, promises to be repeated for an indefinite period, and so is continuous in the sense that it will be persevered in indefinitely. See Ross *v.* Butler.[2]

Several matters have at various times and on various occasions been held to stand in the way of granting an injunction in this class of cases. The principal one is what may be called the "*de minimis*" — "balance of injury" and "discretion" doctrine. It has been said, and held on some occasions, that where the injury to the complainant by the continuance of the nuisance is *small* and the injury to the defendant by its discontinuance is *great*, the court will consider that circumstance, and if the *balance* is greatly against the complainant will, in the exercise of a sound *discretion*, refuse the injunction and leave the complainant to his remedy at law. As instances in which this motion has been advanced in this state may be cited Quackenbush *v.* Van Riper,[3] Van Winkle *v.* Curtis,[4] Railroad Company *v.* Prudden,[5] in the court of errors and appeals; and in the later case of Demarest *v.* Hardham.[6]

The two cases in 2 Gr. Ch., as well as Railroad Company *v.* Prudden, were instances of interlocutory applications, and distinguishable on that ground; and further, in Railroad Company *v.* Prudden, the injunction was dissolved on the express ground that the complainant's right was not clear. And the learned judge says: "The defendants will not occupy, with the proposed track, any of the complainants' lands. For the contingent and consequential damages he may suffer from any unlawful interference with his enjoyment of his property, he has his remedy by action at law, whenever, and as often as loss or damage ensues; *and if the use of a railroad in front of his premises becomes a nuisance, or the aggression proves to be a permanent injury,*

[1] A portion of the opinion, not relating to the question of jurisdiction, is omitted. — Ed.
[2] 4 C. E. Gr. 302. [3] 2 Gr. Ch. 350. [4] 2 Gr. Ch. 422.
[5] 5 C. E. Gr. 530. [6] 7 Stew. Eq. 469.

without an adequate remedy at law, then the court will be competent to administer equitable relief by injunction to prevent its continuance or for its removal. But a strong case must be presented, and the impending danger must be imminent and impressive, to justify the issuing of an injunction as a precautionary and preventive remedy."[1] And in adverting to this opinion in Carlisle *v.* Cooper,[2] the same learned judge distinguishes it from the case of a final hearing for the abatement of a permanent and continuous nuisance. Demarest *v.* Hardham was on final hearing, and while some expressions of the learned vice-chancellor there found standing by themselves may seem to hold that the granting an injunction on final hearing as part of the decree rests in the discretion of the chancellor, I think that, taking what was said on that topic as a whole, it does not bear that interpretation.

With regard to the insignificancy of the injury to the complainant, it seems to me it cannot be taken into account if it be appreciable and such as would clearly entitle him to damages at law. That consideration was urged and overruled, and with it, as I think, the *balance of injury and convenience* notion above stated by the court of errors and appeals in Higgins *v.* Water Co.,[3] which is the latest expression by that court on this subject. At page 544 the learned chief-justice deals with it, and finally disposes of the doctrine that in such cases the court will consider and balance the conveniences, and, if that balance be greatly against complainant, leave him to his remedy at law by repeated suits for damages. He uses this language: —

"The next position taken in behalf of the defendant is, that even if the subtraction of this water is to be held to be wrongful with respect to the complainant, still a court of equity will not give relief by way of injunction, but will leave the parties injured to their remedy at law.

"If this were an application for a preliminary injunction it is clear that an objection of this kind should prevail, for the act which the defendant threatens to do is obviously not of a character to inflict any irreparable injury. But after a court of equity has entertained a bill, and, instead of sending the case to a trial at law, has itself tried the questions of fact involved, and settled the legal right in favor of the complainant, it certainly would be a result much to be deprecated, if, at such a stage of the controversy, it was the law that the chancellor were required to say to such a complainant, 'Your right is clear; if you sue at law you must inevitably recover, and after several recoveries it then will be the duty of this court, on the ground of avoiding a multiplicity of suits, to enjoin the continuance of this nuisance; still you must go through the form of bringing such suits before this court of equity can or will interfere.' In those cases in which, to the mind of the chancellor, the right of the complainant is clear and the damage sustained by him is substantial, so that his right to recover damages at law is indisputable, and the chancellor has considered and established his right, I think it not possible that any authority can be produced

[1] 5 C. E. Gr. 540. [2] 6 C. E. Gr. 584. [3] 9 Stew Eq. 538 (at p. 541).

which sustains the doctrine contended for by the counsel of the defendant. For an example of such a proceeding we are referred to the case of Earl of Sandwich *v.* The Great Northern Ry. Co.,[1] but the authority is not relevant to the point, for the vice-chancellor expressly states that the complainant had suffered no damage. Speaking of the complainant, he says: 'What injunction is he entitled to? Is there any damage done to him? It is not pretended that there is any damage done to him.' This case, therefore, belongs to that class before referred to, where an abstraction of water has been made in a reasonable manner by a riparian proprietor, and where such abstraction does not operate to the detriment of other proprietors, and, as I have already stated, under such circumstances no wrong is done if the transaction be measured either by the rules of law or of equity. But in the present case, if the injunction be refused it must be refused in the presence of the facts that there has been a diminution of this stream to the substantial detriment of the complainant, and a judgment on final hearing to that effect, so that a recovery would follow as a matter of course if suits at law should be brought. Under such circumstances of fact, has a court of equity ever promoted such useless litigation? It is impossible to conceive what benefit would result to either of the litigants from such a course. If this water company is doing a legal wrong, injurious to the complainant, such wrongful conduct must, if persisted in, either now or hereafter, be restrained in equity. After the rights of these parties have been settled in this court, suits at law, founded in this diversion of this stream, would be mere assessments of damages. Judgments in such actions, as a matter of course, must pass in favor of the complainants. To be prohibited, therefore, from doing the wrongful act which must lead to such results, cannot be regarded, with respect to the defendant, as anything inequitable. Nor, under such circumstances, can a court of equity rightly withhold its hand on the ground of any supposed inconvenience to those who are the customers of this company. In a similar situation the English chancellor refused to listen to such an appeal. Such an appeal was made in the case of Broadbent *v.* Imperial Gas Co.[2] The complaint was, that vegetables growing in the market-garden of the complainant were injured by the gas of that company, and when the argument was pressed that this injury was slight in comparison with the benefits conferred by the company on the public, and that on that account this court would not exercise its power to restrain the manufacture of the gas, Lord Cranworth uses this strong language. He says (at p. 462): 'If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on.' He further remarks, 'but unless the company had such a right, I think the present is not a case in which this court can go into the question of convenience or inconvenience, and say, where a party is substan-

[1] L. R. (10 Ch. Div.) 707.

[2] 7 DeG., M. & G. 436.

tially damaged, that he is only to be compensated by bringing an action *toties quoties*. That would be a disgraceful state of the law, and I quite agree with the vice-chancellor in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas.'"

This seems to me to settle the rule in this state.

The case of Broadbent *v.* The Gas Co., so cited by the learned chief-justice, was affirmed on appeal, as reported in L. R. (7 H. L. Cas.) 601. At page 615 Lord Kingsdown uses this language: "It is said that the balance of inconvenience is so great against granting an injunction that it ought not to be done; that in one view of it, it may stop these large and expensive works to the great injury of the public, while, on the other hand, the only inconvenience to which the plaintiff in the suit will be subjected, is the inconvenience of the trifling damage, it is said (*but be it trifling or large makes no difference in principle*) that he may sustain from time to time, for which he may recover compensation by action."

In this case there had been an action at law brought to trial before Lord Chief-Justice Jervis, and so trifling did the action appear that the chief-justice is said by Lord Cranworth[1] to have said, "with his usual keenness, that it was a most ridiculous action."

And I desire here for myself to say that I have never been able to see how the question of the right of the complainant to an injunction on final hearing could ever be a matter properly resting in the "discretion" of the chancellor, as I understand the force of that word in that connection. If by "discretion" is here meant that the judge must be discreet, and must act *with* discretion, and discriminate, and take into consideration and give weight to each circumstance in the case, in accordance with its actual value in a court of equity, then I say that that is just what he must do in every case that comes under his consideration — no more and no less. And that is the sense in which I understand the word is used in Demarest *v.* Hardham. But if the word "discretion" in this connection is used in its secondary sense, and by it is meant that the chancellor has the liberty and power of acting, in finally settling property rights, *at* his discretion, without the restraint of the legal and equitable rules governing those rights, then I deny such power. It seems to me that the true scope of the exercise of this latter sort of discretion in the judicial field is found in those matters which affect procedure merely, and not the ultimate right. For instance, in *In re Anderson*,[2] the question was whether a fund belonging to an infant should be transferred from one guardian to another, and it was held that its transfer rested in the discretion of the chancellor; and other cases are there cited. So with the question whether or not an issue should be framed by the chancellor to try a question of fact. That was declared by the court of errors and appeals, in Carlisle *v.* Cooper,[3] to be a matter resting in the discretion

[1] 7 DeG., M. & G. 445. [2] 2 C. E. Gr. 536. [3] 6 C. E. Gr. 576.

of the chancellor. And so with the issuing of interlocutory injunctions where no property right is immediately affected.[1]

I have taken the trouble to examine many of the cases which seem to hold more or less the contrary of what I understand to be the rule laid down by the court of errors and appeals in Higgins *v.* Water Company, and find most of them distinguishable. The majority of them are rulings upon preliminary injunctions, where the right was not yet settled or where the injury was not a continuing one and the remedy at law ample, or, if on final hearing, there was something inequitable in the complainant's conduct or case which would amount to a defence in equity to an action at law.

And of the English cases it is proper further to observe that some of them gave damages instead of an injunction, under the authority of the acts of parliament for that purpose, called Lord Cairns' and Sir John Rolt's acts. The giving of damages for continuing nuisances is quite within the omnipotent power of parliament, which is competent to take private property for private purposes. In this country, under our constitutional system, as before remarked, that course is forbidden. I think the language of Lord Cranworth, quoted by the learned chief justice in Higgins *v.* Water Company, applies with increased force in this country.

While the "balance of injury" notion has found frequent place in many English cases, the later and best considered of them put the rules governing courts of equity in such cases upon their true ground. Clowes *v.* Staffordshire Works,[2] Wilts *v.* Water Works,[3] Goodson *v.* Richardson, are examples. This last was a case of an injury to a bare right of property without any actual damage. Defendant had laid a watermain in a public street, the fee of which was in the complainant, and Lord Selborne held he was entitled to a mandatory injunction compelling it to remove it. In the course of his judgment he uses this language: —

"It is said that the objection of the plaintiff to the laying of these pipes in his land is an unneighborly thing, and that his right is one of little or no value, and one which parliament, if it were to deal with the question, might possibly disregard. What parliament might do, if it were to deal with the question, is, I apprehend, not a matter for our consideration now, as parliament has not dealt with the question. Parliament is, no doubt, at liberty to take a higher view upon a balance struck between private rights and public interests than this court can take. But with respect to the suggested absence of value of the land in its present situation, it is enough to say that the very fact that no interference of this kind can lawfully take place without his consent, and without a bargain with him, gives his interest in this land, even in a pecuniary point of view, precisely the value which that power of veto upon its use creates, when such use is to any other person de-

[1] Amelia Co. *v.* Tenn. Co., 123 Fed. R. 881; Beckwith *v.* Howard, 6 R. I. 1, 13 *Accord.* — Ed.

[2] L. R. (8 Ch. App.) 125, 142, 143.

[3] L. R. (9 Ch. App.) 451.

sirable and an object sought to be obtained. Besides which, I am not prepared to accede to the proposition that it is an unneighborly proceeding in a man, whose motive for desiring to prevent a particular act may be collateral to the interest in his land — such, for instance, as his being a proprietor of waterworks which may be injured by the proposed use of it — to say to his neighbor who wishes to compete with him in that business, 'You are perfectly at liberty to enter into competition with me as a seller of water to the public of Ramsgate in any lawful manner, but you are not at liberty to take my land without my consent for the purpose of competing with me, and I shall object to your doing so.' In that, I confess, I see nothing unneighborly whatsoever. . . . I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction."

There was, in the case in hand, no contention that the neighborhood here in question was ever given up by common consent to mechanical or manufacturing purposes. It seems to be one, mainly, of cheap residences and retail shops. The language of Chancellor Zabriskie in Ross *v.* Butler[1] is apt: —

"I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders, or intolerable noises, even if the inhabitants are themselves artisans, who work at trades occasioning some degree of noise, smoke, and cinders. Some parts of a town may, by lapse of time, or prescription, by the continuance of a number of factories long enough to have a right as against every one, be so dedicated to smells, smoke, noise, and dust, that an additional factory, which adds a *little* to the common evil, would not be considered at law a nuisance, or be restrained in equity.

"There is no principle in law, or the reasons on which its rules are founded, which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer and their families the fewer and more restricted comforts which they enjoy."

The result of a careful review of the evidence upon my mind is to lead me to the conclusion that the degree of injury is such as to entitle the complainant to damages in an action at law, with the result that he is entitled to an injunction in this court.

I will advise a decree that the defendant be restrained from so using his machines as to cause the complainant's house to vibrate, and also

[1] 4 C. E. Gr. (at pp. 305, 306).

from allowing the water and spray from the exhaust of his engines to come on to the complainant's lands.[1]

DANIELS AND OTHERS *v.* THE KEOKUK WATER WORKS.

SUPREME COURT, IOWA, OCTOBER 2, 1883.

[61 *Iowa Reports*, 549.]

THE petition states that plaintiffs are residents of the city of Keokuk, and are owners of dwelling houses therein, which are situated on a bluff. That defendant has erected an engine and pumping house at the foot of the bluff near said dwelling houses, and have placed therein boilers and engines, in operating which soft coal is burned, which emits dense masses of black smoke, gases, and soot. That the top of defendant's smoke-stack is about opposite the base of plaintiff's houses, and whenever the wind blows in certain directions the entire volume of smoke, gas, and soot is turned in the direction of said premises, enveloping and penetrating said houses, and soot in large quantities is deposited on said premises, to the great damage, detriment, inconvenience, and annoyance of the plaintiffs, whereby they have been deprived of the comfortable enjoyment of their property. The relief asked is that defendants be perpetually enjoined from so using their works as to cause smoke, gas, and soot to fall on and envelop the premises as above stated.

The defendant admitted the erection of the works, but denied that the same were a nuisance, and stated that it was duly authorized to construct its works by an ordinance of the city, which was enacted in pursuance of a statute conferring the requisite power, and that said works had been worked without complaint for three years. That defendant has used all the latest appliances for consuming smoke, and has endeavored to so use the works as to prove of benefit to the public. That defendant has invested in said works a sum in excess of one hundred thousand dollars, and that the only reliable means of extinguishing fires in the city is the use of the water furnished by defendant.

[1] Clowes *v.* Staffordshire Co., 8 Ch. 125; Pennington *v.* Brinsop Co., 5 Ch. D. 769; Young *v.* Bankier Co. [1893] App. Cas. 691, 702; Hobbs *v.* Amador Co., 66 Cal. 161 (mining debris); Chestatee Co. *v.* Cavenders Co. (Ga. 1903) 45 S. E. R. 267 (diversion of water); Weston Co. *v.* Pope, 155 Ind. 394 (pollution of water); Paddock *v.* Somes, 102 Mo. 226 (flooding); Corning *v.* Troy Factory, 40 N. Y. 191; Amsterdam Co. *v.* Dean, 13 N. Y. Ap. Div. 42, 45; 162 N. Y. 278; Townsend *v.* Bell, 62 Hun, 306; Brown *v.* Ontario Co., 81 N. Y. Ap. Div. 273; Beckwith *v.* Howard, 6 R. I. 1, 13; Middlestadt *v.* Waupaca Co., 93 Wis. 1, 4 (*semble*) *Accord*.

In Chestatee Co. *v.* Cavenders Co., *supra*, the court said: "Though the threatened injury may have been such as to result in no material damage to the plaintiff, and though the commission of the trespass would greatly have benefited the defendant, the latter should still have been enjoined, for 'the necessities of one man's business cannot be the standard of another man's rights.' Wheatley *v.* Chrisman, 24 Pa. 302." — ED.

The court entered a decree perpetually restraining the defendant from "using its smoke-stack without using a proper smoke consumer to prevent smoke, soot, etc. from escaping therefrom," and adjudged that each pay one half of the costs. The plaintiffs appeal.

SEEVERS, J. The defendant has not appealed, and does not complain of the decree. Therefore we are relieved of the necessity of determining whether the court should have required the defendant to use a smoke consumer. The plaintiffs insist that they are entitled to an absolute and unconditional decree enjoining the defendant from using its smoke-stack, and thereby causing the nuisance of which complaint is made.

It will be observed that it is not alleged in the petition that the health of the plaintiffs or their families is affected by the alleged nuisance, or that their property has been, or probably will be, destroyed, but only that they have suffered great "damage, detriment, inconvenience, and annoyance."

When the wind is in a southerly direction, smoke and soot from the smoke-stack are blown and deposited on plaintiffs' premises. At times the smoke is dense, and soot and smoke penetrate plaintiffs' houses to such an extent as to require the windows on the southerly side to be closed. Soot falls on clothes hung out to dry, and on the grass, flowers, carpets, beds, and on the persons of plaintiffs and their families.

The defendant's works are situate at the base of a bluff, on top of which are the premises of plaintiffs. The top of the smoke-stack is about twenty feet below the basement of the houses, and from four to five hundred feet distant. We are impressed by the evidence that the plaintiffs, because of the escape of smoke and soot from defendant's smoke-stack, are deprived of the comfortable enjoyment of their property, and the statute defines this to constitute a nuisance, for which the party injured may bring an action at law, in which action the nuisance may be enjoined or abated and damages recovered. Code, § 3331.

It is insisted by the appellee that under this statute the appellants have a full, complete, and adequate remedy at law, and that equity has no jurisdiction to enjoin a nuisance which only has the effect to deprive a person of the comfortable enjoyment of property. It is said that it has been so held in Wisconsin, under a similar statute. Remington *et al. v.* Foster.[1] We do not feel called on to determine this question.

The defendant was authorized by an ordinance of the city to construct the water works. The ordinance was passed in pursuance of Code, section 472, which expressly confers on the city the requisite power. The ordinance requires a number of hydrants to be constructed, and the defendant is compelled to constantly supply a large quantity of water for extinguishing fires, and at the expiration of ten years the city has the option of purchasing the works at an appraised

[1] 42 Wis. 608. But see now Wauwatosa *v.* Dreutzer, 116 Wis. 117. — ED.

valuation. The defendant has expended about one hundred thousand dollars in the construction of the works.

But the only complaint made is in regard to the smoke-stack, and its possible faulty construction. What it cost does not appear, but undoubtedly it was only a small sum, compared with the whole cost of the works.

The appellants claim that the smoke-stack can be built one hundred feet higher at a comparatively small expense, and that, when this is done, the smoke and soot will pass over and beyond their premises. But this is mere conjecture. The smoke-stack cannot be built higher than it is with safety, unless it is enlarged at the base, and the work of construction proceed therefrom.

We are not satisfied that, if the smoke-stack should be constructed one hundred feet higher, no soot would be deposited on plaintiff's premises, but conceding such would be the case, we are not satisfied there are not others that would suffer therefrom in as great a degree as the plaintiffs do. While the plaintiffs, possibly, might be relieved of smoke and soot, if the height of the smoke-stack were increased, it by no means follows that the defendant would be relieved of the charge of creating a nuisance.

The cases, both in this country and England, are numerous, where courts of equity have restrained nuisances by injunction, and have refused to do so. No practical benefit would result from a citation of cases. It is deemed sufficient to say that this remedy is more freely administered now than formerly. The rule is well known and understood. The real difficulty consists in the application of the rule to a given state of facts. Each case must be determined by its own special circumstances. Some courts more than others have hesitated or refused to grant an injunction until the existence of the nuisance has been established at law. If the matter or thing complained of is in and of itself a nuisance, equity will more readily interfere; or if the injury is irreparable and cannot be compensated in damages, as when the nuisance is injurious to health, or has the effect to destroy property, the remedy by injunction is more fully administered. See Pennsylvania Lead Company's Appeal,[1] where poisonous matter was deposited on the plaintiff's premises, whereby vegetation was destroyed. So in Campbell *v.* Seaman,[2] where, in the manufacture of brick, a large quantity of "sulphurous acid gas" was produced, which destroyed the plaintiff's trees and vines. This, however, as we understand, was an action at law, and the existence of the nuisance had been established therein before the injunction was issued.[3]

In Richards' Appeal,[4] a case in some respects much like the one at bar, an injunction was refused, on the ground that the manufacture of iron was lawful, and its production essential. The court said:

[1] 96 Pa. St. 116. [2] 63 N. Y. 568.

[3] This is a mistake. The litigation between Campbell and Seaman was exclusively in equity. — Ed.

[4] 57 Pa. St. 105.

"Especially should the injunction be refused, if it be very certain that a greater injury would ensue by enjoining, than would by a refusal to enjoin. . . . Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing, and leaving the party to his redress at the hands of the court and jury." It is said, this case has been overruled by the Pennsylvania Lead Co. case above cited; but we do not understand this to be so. See also Rhodes *v.* Dunbar;[1] Goodall *v.* Crofton;[2] Gilbert *v.* Showerman;[3] Louisville Coffin Co. *v.* Warren;[4] Green *v.* Lake;[5] Simpson *v.* Justice;[6] Hyatt *v.* Myers.[7]

In the foregoing cases, the nuisance was created by manufacturing companies, organized wholly for pecuniary profit, and the public benefit was purely incidental, and such as arises from the establishment of all enterprises of that character. While there is no doubt the defendant was organized with a view of proving a pecuniary benefit to the stockholders, yet this was not the only purpose of its organization. The benefit to the public, that is, to the citizens of Keokuk, is immediate and direct.

If the defendant were enjoined even for a time, the result might be disastrous; for the water supplied by it is the only efficient means of extinguishing conflagrations at the command of the city or its citizens. Besides this, a daily and hourly supply of water used for many purposes would be cut off.

We think it may be safely assumed that the rule in equity is, that where the damages sustained can be admeasured and compensated, equity will not interfere where the public benefit greatly outweighs private and individual inconvenience.[8] Coe *v.* Winnipiseogee Manufacturing Company;[9] Porter *v.* Witham.[10]

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[1] 57 Pa. St. 274. [2] 33 Ohio St. 271. [3] 23 Mich. 448. [4] 78 Ky. 400.
[5] 54 Miss. 540. [6] 8 Ired. Eq. 115. [7] 73 N. C. 232.

[8] Lillywhite *v.* Trimmer, 36 L. J. Ch. 525 (*semble*), per Malins, V. C.; Att'y-Gen. *v.* Gee, 10 Eq. 131 (*semble*), per Malins, V. C.; Clifton Co. *v.* Dye, 87 Ala. 468 (*semble* — pollution by Mining Co.); Drake *v.* Lady Ensley Co., 102 Ala. 501, 507 (*semble*); Herr *v.* Central Asylum, (Ky. 1901) 22 Ky. L. Rep. 1722 (*semble* — diversion and pollution of water); Campbell *v.* Seaman, 63 N. Y. 568, 586 (*semble*); Riedeman *v.* Mt. Morris Co., 56 N. Y. Ap. Div. 23 (*semble* — see criticism of opinion in 14 Harv. L. Rev. 458) *Accord.*

In North Carolina the court in several cases would not restrain the continuance of nuisances, although prejudicial to the health of the plaintiff's family or otherwise rendering his premises uninhabitable, because an injunction would have caused public inconvenience. Eason *v.* Perkins, 2 Dev. Eq. 38 (flooding); Barnes *v.* Calhoun, 2 Ired. Eq. 199 (flooding); Hyatt *v.* Myers, 73 No. Ca. 232 (steam mill); Daughtry *v.* Warren, 85 N. Ca. 136. But these decisions must be regarded as the indirect result of North Carolina legislation.

Legislation may legalize small nuisances. An act which was formerly a tort, being, by such legislation, no longer a tort, an injunction against it is, obviously, out of the question. Sawyer *v.* Davis, 136 Mass. 239 (nullifying the injunction granted in Davis *v.* Sawyer, 133 Mass. 289, against bell-ringing for mill workmen); Titus *v.* Boston, 161 Mass. 209 (increase of sewage in city sewer); Murtha *v.* Lovewell, 166 Mass. 391 (furnace for melting iron). Conversely, a statute may convert into a nuisance an act which was before not a tort. The remedy by injunction follows as a consequence of such legislation. Rideout *v.* Knox, 148 Mass. 368 (spite fence); cases cited *supra*, 30, n. 1, last paragraph.

Injunctions were denied in Valparaiso *v.* Hagen, 153 Ind. 337, a case of pollution of a stream by municipal sewage, and Barnard *v.* Sherley, 135 Ind. 547, a case of pollution of a

[9] 37 N. H. 254. [10] 17 Me. 292.

The right of every person to pure air must be conceded, but where persons choose to reside in cities and towns, which have or should have efficient means of extinguishing conflagrations, and an abundant supply of water for many other purposes, they must be regarded as willing to surrender a portion of their rights for the attainment of so desirable an end. The works of the defendant are properly located. In no respect is the construction faulty. The injury caused to the plaintiffs is not irreparable. Their inconvenience and annoyance must yield to the public good in so far as the interposition of equity is concerned. There is no ground for equitable interference because of the multiplicity of suits if plaintiffs are driven to an action at law, because the remedy in this respect is full and complete.

Affirmed.

SHELFER *v.* CITY OF LONDON ELECTRIC LIGHTING CO.

COURT OF APPEAL, DECEMBER 18, 1895.

[*Law Reports*, [1895] 1 *Chancery Division*, 287.]

APPEAL from Mr. Justice Kekewich.

William Shelfer was the leaseholder and Meux's Brewery Company were the reversioners of a public-house more than forty years old, known as the Waterman's Arms, situate at Bankside, on the River Thames.

The defendants, in the end of the year 1791, acquired land adjacent, but not contiguous, to the Waterman's Arms, and situate on the western side thereof, and they erected on the land so acquired sheds, engine-houses, a shaft, and all the buildings and machinery necessary for forming a large central station for the purpose of supplying electric light over a considerable area of the metropolis comprised within their limits of supply. Foundations for the works were sunk from twenty-five to thirty feet below the surface of the ground, and engines (some of which were not more than thirty feet distant from the western wall

stream by mineral water pumped up from the land of the defendant, a riparian proprietor, used for bathing by hospital patients, and permitted to flow into the stream. But these cases do not support the equitable doctrine of the principal case, for the acts of the defendants, by the law of Indiana, are not torts at common law. Barnard *v.* Shirley, 151 Ind. 160; Richmond *v.* Test, 18 Ind. Ap. 482. A similar view obtains in Pennsylvania as to damage to a plaintiff caused by the working of mines, which cannot be developed without producing such damage. Pa. Co. *v.* Sanderson, 113 Pa. 126 (overruling Sanderson *v.* Pa. Co., 86 Pa. 401; Pa. Co. *v.* Sanderson, 94 Pa. 302; and Sanderson *v.* Pa. Co., 102 Pa. 370); Robb *v.* Carnegie, 145 Pa. 324 (*semble*). It is hardly necessary to add that these Indiana and Pennsylvania decisions are abnormal. They are opposed to principle and to the following authorities: Young *v.* Bankier Co., 1893, Ap. Cas. 697, 701 (mining); Platt *v.* Waterbury, 72 Conn. 531 (sewage); Beach *v.* Stirling, 54 N. J. Eq. 65, 55 N. J. Eq. 824 (mining); Att'y-Gen. *v.* Paterson, 58 N. J. Eq. 1 (sewage); Simmons *v.* Paterson, 60 N. J. 385 (sewage); Strobel *v.* Kerr Co., 164 N. Y. 303, 165 N. Y. 617 (mining); Mann *v.* Willey, 51 N. Y. Ap. Div. 169 (affirmed 168 N. Y. 664 — sewage); Columbia Co. *v.* Tucker, 48 Oh. St. 41 (mining). — ED.

of the Waterman's Arms) of 500 and 1000 horse-power were erected and fixed and commenced to work.

These two actions were brought by Shelfer and Meux's Brewery Company, claiming injunctions to restrain the defendants from so working their engines and so carrying on their works at Bankside as by reason of vibration or otherwise to cause damage to any part of the premises known as the Waterman's Arms, or the structures, fixtures, or fittings thereof, or to interfere with the enjoyment of the premises by the occupier for the purposes of his business as a licensed victualler and innkeeper or otherwise. Damages were claimed in both actions.

Kekewich, J. (His Lordship held, upon the evidence, that the acts of the defendants constituted a nuisance, and had damaged the plaintiffs' premises so as to make them less comfortable, to injure the structure, and decrease the value; but that as to the plaintiff, Shelfer, having regard to the fact that the profits of his business had not been interfered with, and to the character of the nuisance, and to the great inconvenience that would be caused by stopping the business of the defendants, damages were a fair compensation, and no injunction ought to be granted.)

The plaintiffs in both actions appealed against this decision so far as it refused the injunctions claimed therein.[1]

Lindley, L.J.: —

The nuisance complained of in these actions is clearly proved as a fact. It is also proved that the nuisance is of a very serious character, and will continue and will increase if the defendants are allowed to enlarge their machinery and to extend their operations as they propose to do.

The persons who complain of this nuisance are (1) Shelfer, who is a lessee for twenty-one years and the occupier of a public house near the defendants' works, and (2) Meux's Brewery Company, who are his lessors. Both ask for an injunction, and for damages for the injury already done. They have not joined in one action, as they might have done;[2] but they have brought separate actions, which, however, came on for trial together.

The learned judge has refused an injunction in both actions, and has simply directed an inquiry as to damages. From this decision the plaintiffs in both actions have appealed, and they ask for an injunction.

The defendants have not appealed: they do not, they say, object to pay damages or compensation; but they strongly object to an injunction; and in opposing an injunction their counsel have contended that the defendants have done no actionable wrong, that the statute which applies to them authorizes, and indeed requires, them to supply elec-

[1] The statement of facts has been abridged, and of the rest of the report only the judgment of Lindley, L.J., is given. Lord Halsbury and Smith, L.J, delivered concurring judgments. — Ed.

[2] In Ingraham *v.* Dunnell, 5 Met. 118, 125, the court made the surprising statement that a reversioner in a suit for an injunction to restrain a nuisance must join the tenant as a co-plaintiff. — Ed.

tricity, and that the nuisance complained of is authorized by statute, and must therefore be submitted to by those who unfortunately suffer from it. It was contended by the plaintiffs that it was not open to the defendants to take this course without themselves appealing against the judgment for damages; but this contention cannot be supported. The defendants are entitled, if they choose, to waive their own right, if any, to appeal, and yet to resist the further relief which the plaintiffs seek to obtain against them.

The defendants' contention that the nuisance is authorized by Act of Parliament cannot be supported. This question turns on the Electric Lighting Act, 1882, ss. 10, 17, and on the Provisional Orders of 1890 and 1891 made under its authority. Those orders prescribe the conditions on which the defendants are entitled to exercise their statutory powers; and these orders expressly say that nothing in them shall justify a nuisance.

I will add further that it is clearly for the defendants to prove, if they can, the truth of their assertion that it is impossible for them to carry on their business without creating a nuisance. The evidence as it stands does not satisfy me that this is really true. The defendants have not proved that they cannot supply electricity properly if they multiply their stations and diminish the power of their engines at each station. It is not shown that they cannot in this way avoid creating a nuisance at any of their stations.

The nuisance not being legalized, the question arises whether the plaintiffs are not entitled to an injunction. I will take the tenant's case, Shelfer's, first.

Before Lord Cairns' Act the tenant certainly would have been entitled to an injunction to protect him during his tenancy. Nothing can be more explicit on this point than the judgment of the House of Lords in Imperial Gas Light and Coke Company *v.* Broadbent,[1] where a market gardener obtained an injunction against a gas company who injured his crops. Lord Campbell, L.C., in the course of his judgment in that case, after saying that it was one in which the nuisance continued and had been aggravated, goes on:[2] "Then, under these circumstances, unless there is something peculiar in this case, it would be a matter of course to grant an injunction . . . This is the very case for an injunction, because it is a case in which an action cannot sufficiently indemnify the party who is injured. . . . Then what is the great inconvenience that is to arise to the appellants? It is said that they have a duty to perform to the public. I consider that this is to be regarded as a mere commercial adventure; they have the liberty to make these works for their own profit, but no indictment would lie against them for omitting to do so; no action could be maintained against them if they could not supply gas." He adds that the appellants must either find out some mode by which they can carry on their works without injuring the plaintiff, or must limit their quantity of gas, and that he does not believe that the public will suffer from the

[1] 7 H. L. C. 600. [2] 7 H. L. C. 610.

injunction being maintained. Lord Kingsdown also in his judgment expresses himself thus [1]: "The rule I take to be clearly this: if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law; but when he has established his right at law, I apprehend that unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

Lord Cranworth, moreover, in his judgment in this same case, says: [2] "If it should turn out that the company had no right so to manufacture gas as to damage the plaintiff's market-garden, I have come to the conclusion, that I cannot enter into any question of how far it might be convenient for the public that the gas manufacture should go on."

This case is accordingly an authority to show that an injunction would not be refused on the ground that the public might be inconvenienced if an injunction were granted.

But then it is urged that, although this was the law before Lord Cairns' Act, that Act has given the court a discretion to award damages even in the case of a clear continuing nuisance of a serious character.

It is very true that Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2, conferred upon the Court of Chancery jurisdiction which it had not before to award damages in lieu of an injunction. That section enacts that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction . . . against the commission or continuance of any wrongful act . . . it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction. . . ."

The jurisdiction to give damages instead of an injunction is in words given in all cases; but the use of the word "damages" has led to a doubt whether the Act applies to cases where no injury at all has yet been inflicted, but where injury is threatened only. Subject, however, to this doubt, there appears to be no limit to the jurisdiction. But in exercising the jurisdiction thus given attention ought to be paid to well settled principles; and ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the legislature intended to turn that court into a tribunal for legalizing wrongful acts; or in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is in some sense a public benefactor (*e. g.*, a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when parliament has sanctioned it. Courts of justice are not like parlia-

[1] 7 H. L. C. 612.

[2] 7 D. M. & G. 436, 462.

ment, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation, and the deprivation of people of their rights with or without compensation. Lord Cairns' Act was not passed in order to supersede legislation for public purposes, but to enable the Court of Chancery to administer justice between litigants more effectually than it could before the Act. That this is the view which has always been taken of the Act is plain from Goldsmid *v.* Tunbridge Wells Improvement Commissioners,[1] Clowes *v.* Staffordshire Potteries Waterworks Company,[2] Krehl *v.* Burrel,[3] and Martin *v.* Price.[4] In Martin *v.* Price the principle on which the court ought to act was quite recently enunciated and enforced. The court there said, in a carefully considered judgment, "The plaintiff's legal right, and its infringement already, and threatened further infringement, to a material extent being thus established, the plaintiff is entitled to an injunction according to the ordinary principles on which the court is in the habit of acting in these cases. There might, of course, be circumstances depriving the plaintiff of this *prima facie* right; but we can discover none in this case." In that case, accordingly, the court of appeal granted an injunction, which had been refused by the court below, being of opinion that the discretion given to the court by Lord Cairns' Act had been wrongly exercised. So here, guided by the same principles, I come to the same conclusion.

Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt to specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisances: cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy — as where the acts complained of are already finished — an injunction can be properly refused. There are no circumstances here which, according to recognized principles, justify the refusal of an injunction; and in my opinion, therefore, an injunction ought to have been granted in the action brought by the tenant.

I pass now to the action brought by Meux's Brewery Company, the landlords. They sue in respect of actual and prospective injury to their reversion. Actual injury is proved, for their house is structurally injured by the defendants' operations, and further prospective injury from continued and increased vibration is also proved. This is not the case of a temporary nuisance, which is likely to cease before the existing tenancy expires, and which nuisance, therefore, although it may affect the present value of the reversion, will not affect

[1] Law Rep. 1 Ch. 349.
[2] *Ibid.* 8 Ch. 125.
[3] 7 Ch. D. 551; 11 Ch. D. 146.
[4] [1894] 1 Ch. 276, 285.

its value when it falls into possession. The nuisance is of a totally different character; and for such a permanent nuisance as this, and consequent permanent injury to the reversion, I have no doubt an action by the reversioner for damages would lie. The cases on this subject, from Baxter *v.* Taylor [1] downwards, will be found collected in Mr. Justice North's judgment in Mayfair Property Company *v.* Johnston,[2] and I do not therefore refer to them here.

It is true that in Jones *v.* Chappell [3] an injunction sought by a reversioner to restrain noise and vibration was refused; but it was refused because they might cease before the reversion came into possession. But in this case it is idle to suppose that the vibration, which is the real cause of the continuing injury, will cease. It must be borne in mind that the defendants are a corporation created for the express purpose of supplying electricity for a time to which no limit can be assigned; and they have gone to great expense in making foundations and erecting permanent works on a large scale. Jones *v.* Chappell [4] may be compared with Clowes *v.* Staffordshire Potteries Waterworks Company.[5] There a reversioner applied for an injunction to restrain the defendants from fouling a stream. The Vice-Chancellor Malins refused the injunction, on the ground that the reversion was not materially or permanently injured, and that if it was, the plaintiff's remedy was for compensation under the defendants' special Acts. But on appeal this decision was reversed, and an injunction was granted, Lord Justice James saying that the injunction was really a matter of course. This case arose after Lord Cairns' Act had come into operation. The common law decisions show that an action by a reversioner for an injury to his reversion will lie if he can prove actual damage to his reversion, or, as some express it, an injury of such permanent nature as to be necessarily injurious to his reversion. Where this is proved, as it is here, a reversioner is in my opinion entitled to an injunction upon the principles which I have already explained. In Meux's action also, therefore, I think an injunction ought to have been granted.[6]

There ought to be one order on both appeals, varrying the judgments appealed from by granting an injunction to restrain the defendants from carrying on their works so as to occasion a nuisance to the plaintiffs in either action. The form ought to be that adopted when landlord and tenant join in one action to have their respective interests protected. The defendants must pay the costs of the action

[1] 4 B. & Ad. 72. [2] [1894] 1 Ch. 516. [3] Law Rep. 20 Eq. 539.
[4] Law Rep. 20 Eq. 539. [5] Law Rep. 8 Ch. 125.

[6] For want of proof of injury or threatened injury to the reversion, the landlord's bill for an injunction was dismissed in Moot *v.* Shoolbred, 20 Eq. 22; Jones *v.* Chappell, 20 Eq. 539; Broder *v.* Saillard, 2 Ch. D. 692; Atkins *v.* Chilson, 7 Met. 398; Beir *v.* Cook, 37 Hun, 38.

An injunction against a nuisance will be allowed to a tenant for a single year, Walker *v.* Walker, 51 Ga. 221. To a tenant from year to year, Inchbald *v.* Robinson, 4 Ch. 388, 395. To a tenant from week to week, Jones *v.* Chappell, 20 Eq. 539. But see *contra* Clarke *v.* Thatcher, 9 Mo. Ap. 436 (tenant from month to month). A husband, however, cannot maintain a bill to restrain a nuisance affecting the enjoyment of property belonging to the wife, although he lives with her on the property, Kavanaugh *v.* Barber, 131 N. Y. 211.— Ed.

brought by Meux's Brewery Company, and also the costs of these appeals.

The damages in Meux's Brewery Company's action ought to be referred to the same referee to whom the damages in Shelfer's action have been referred. This will protect the defendants from the risk of having to pay more than they ought in the aggregate.[1]

For the reasons above given, these appeals must be allowed.

S. S. STETSON *v.* THE CHICAGO AND EVANSTON R. R. CO.

SUPREME COURT, ILLINOIS, SEPTEMBER TERM, 1874.

[75 *Illinois Reports*, 74.]

MR. JUSTICE SCOTT delivered the opinion of the court:

Under a special charter, and by permission of the city of Chicago granted by ordinance, the Chicago and Evanston R. R. Co. constructed its railroad upon Southport Avenue in front of a block of ground owned by complainant, which had been subdivided into lots, some of which fronted on the avenue, with a view to use cars on its road propelled by steam. No part of complainant's land had been taken for the use of the road. The right to relief is predicated on the alleged fact, the construction of the railroad track had depreciated and decreased the value and price of lots fronting on the avenue; that the running of trains of cars and locomotives would further diminish the value and price of lots, and would render access inconvenient and difficult. A motion for a preliminary injunction was denied, and a

[1] The doctrine that a plaintiff whose right is invaded or threatened is entitled to an injunction against a nuisance, although the damage to the defendant from the injunction is far greater than damage to the plaintiff by the continuance of the nuisance, and although the injunction may cause much inconvenience to the public, was applied in the following cases. Att'y-Gen. *v.* Birmingham, 4 K. & J. 528; Imperial Co. *v.* Broadbent, 7 H. L. C. 600, 615; Att'y-Gen. *v.* Colney Hatch, 4 Ch. 146, 155; Harding *v.* Stamford Co., 41 Conn. 87; Dwight *v.* Hayes, 150 Ill. 273; Stock *v.* Jefferson, 114 Mich. 357 (explaining Potter *v.* Street Co., 83 Mich. 298 and earlier Michigan cases); Ives *v.* Edison, 124 Mich. 402 (*semble*); Acquackanong Co. *v.* Watson, 29 N. J. Eq. 366; Higgins *v.* Fleming Co., 36 N. J. Eq. 538; Pa. Co. *v.* Angel, 41 N. J. Eq. 316; Harper Co. *v.* Mountain Co. (N. J. Eq. 1903) 56 Atl. R. 297, 301; Smith *v.* Rochester, 38 Hun, 612, affirmed 104 N. Y. 674; Densler *v.* Johnston, 24 N. Y. Ap. Div. 608.

In Att'y-Gen. *v.* Birmingham, *supra*, Wood, V. C., said, p. 539: "Now, with regard to the question of the plaintiff's right to an injunction, it appears to me, that, so far as this court is concerned, it is a matter of almost absolute indifference whether the decision will affect a population of 250,000 or a single individual carrying on a manufactory for his own benefit. . . . I am not sitting here as a committee for public safety, armed with arbitrary power to prevent what, it is said, will be a great injury, not to Birmingham only, but to the whole of England, — that is not my function."

In Dwight *v.* Hayes, *supra*, the court cited with approval, p. 27, the following from Gould *v.* Waters: "If any nuisance of this kind be shown, though causing inconsiderable damage, equity will enjoin its continuance. In deciding upon the right of a proprietor to an injunction against such a nuisance, the court will not consider the convenience of the public. The fact that a large population will be affected by an interruption of the use of the system of sewers is immaterial where the rights of an individual are invaded." — ED.

demurrer having been sustained to the bill, it was dismissed for want of equity.

No direct or physical injury has been done to complainant's property. The track was constructed wholly upon the street, the fee of which is in the city of Chicago. It may be regarded as the settled law of this state, an owner of an abutting lot cannot prevent the use of a street for a railway when such use is permitted by the city and is authorized by an act of the legislature. It is equally well settled, the abutting owner is not entitled to any compensation for the new use of the street. Moses *v.* The Pitts., Ft. Wayne & Chic. Ry. Co.;[1] Murphy *v.* Chicago.[2]

The doctrine of these cases in this particular has not been departed from, but on the contrary, has been expressly affirmed in the recent case of Stone *v.* Fairbury, Pontiac & N. W. Ry. Co.[3] The principle is, the adjoining proprietor has no interest in the fee of the street and therefore cannot recover for an injury to it. Where the fee of the street, however, remains in the abutting land owner a recovery has been permitted, for the reason the railroad is an additional burden, on the principle, if the land was dedicated, it was for the use of ordinary travel, and if it was condemned, the damage was assessed with no other view. Ind., Bloomington & Western R. R. Co. *v.* Hartley *et al.*[4]

Whatever damages, if any, the complainant has suffered, are consequential, and arise from the lawful use of the adjoining street, in which he has no interest except an easement in common with the public. The question, therefore, of most importance is, whether equity will assume to enjoin the use of the railroad upon the street, until the land-owners' damages shall have been assessed and paid under the eminent domain law, or will he be remitted to his remedy at law. The constitutional provision is, that "private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury as shall be prescribed by law." Manifestly all proceedings for the condemnation of private property for public uses are at law, and accordingly the general assembly has provided by general law how such proceedings shall be commenced and conducted. Eminent Domain Act, 1872.

The mode of procedure is definitely pointed out. Where the right to take private property for the construction of any railroad or other public use, or which may damage property not actually taken, has been conferred upon any corporate authority, and such corporation cannot agree with the owner as to such just compensation, it is made the duty of the party authorized to take or damage such property to file a petition describing the property, and asking to have the compensation assessed. What construction shall be given to the words in this act, "which may damage property not actually taken," involves some difficulty, unless they are understood to refer to contiguous

[1] 21 Ill. 522. [2] 29 Id. 280. [3] 68 Id. 394. [4] 67 Id. 439.

lands of the same owner, not actually taken. A portion of the land having been taken, the remainder may be damaged in consequence of the taking. Where the party seeking to make the condemnation has not embraced all of the owner's contiguous lands, not actually taken, but damaged, the owner may file a petition in the nature of a cross petition, and have his damages for land not actually taken assessed in the same proceeding. Mix *v.* L. B. M. R. R. Co.[1]

It must be in this sense the word "damaged" is employed in the act to provide for the exercise of the right of eminent domain. The damages are direct and physical, and result from taking a portion of the land. But where no portion of the land is taken, and the damages suffered are consequential, by reason of what the corporation does upon its own land or that of another, it does not seem there is any warrant for instituting proceedings for the ascertaining of such damages. In the case at bar, one allegation in the bill is, the company denies the owner of the adjacent land has sustained any damage, and it seems absurd the company shall be required to file a petition alleging the owner has sustained damage. Without such allegation, what would there be to try? No land is sought to be condemned, and the company contest the fact of consequential damages. Where land itself is taken, it always has some value, and that gives the court jurisdiction of the cause. It would be a singular proceeding if the corporation should file a petition alleging the owner of land in proximity to a public improvement had sustained no damage, and ask the court to adjudicate upon it.

A case analogous in principle arose under the road law, prior to the adoption of the present constitution. It is the case of Hoag *v.* Switzer *et al.*[2] The commissioners had laid out a highway adjoining and abutting the premises of complainant, but no portion of his land was taken. The highway was constructed on lands of another, in which he had no interest. He filed a bill to prevent the highway commissioners from opening the road until his damages should be assessed and paid. It was decided he was not entitled to have the question of damages considered by the commissioners of highways at the time they laid out the road, nor was it necessary any assessment should be made of the damages he may have sustained before the road could be legally opened. The principle of that case has its application to the case at bar. How can it be known before the completion of the railroad what damages, if any, the complainant will sustain, and how could the same be measured? He has not been compelled to part with any of his private property, and whether he will sustain damage by reason of the construction of the road, is a matter that must be determined by proof of the consequences that will follow. The construction of the road-bed, and the operation of trains, may or may not injuriously affect his property. That question can more appropriately be determined in an action at law. Such cases can be referred to no general head of equity jurisdiction.

[1] 67 Ill. 319.

[2] 61 Id. 294.

It is not claimed, any portion of his property has been taken or is about to be seized. What injury, if any, he has sustained, may be compensated by damages recoverable by an action at law. Because a party would sustain consequential damages by the construction of a railroad, constitutes no reason why the company may not enter upon its own lands, or any other lands in which he has no interest, to construct its road. The company would not be bound to stop and litigate the question of damages with every one who may claim to be injured. Were this the law, it would be found to be utterly impracticable to construct any railroad or other public improvement within any reasonable time. The case of Hoag *v.* Switzer *et al.*, *supra*, is to this effect. We have been referred to no case where this exact point was involved, that holds any such doctrine as that contended for. The question did not arise in The People *v.* McRoberts,[1] and what is said in the opinion is not to be understood as being on this subject. It has more appropriate reference to compensation for land taken and damages to contiguous lands of the same owner not actually taken, but damaged.

In Hall *et al v.* The People,[2] it was held no man could be compelled to part with his property without just compensation, and that no corporation, public or private, could rightfully appropriate private property to its own use without first tendering or paying the damages assessed under the forms of the law. A party ought not to be driven to an action against a corporation, responsible or irresponsible, for his damages. This would be to take his property without first making compensation, and would be a plain violation of a constitutional right. But the damages alluded to are such direct damages as are incident to or naturally flow from the taking of private property for public uses. No allusion is made to, nor can the principles of that case be applied to consequential damages not the result of taking private property. It was never intended to apply the principle to the latter class of cases.

English statutes contain provisions in substance the same as the statute we are considering, and have been the subject of judicial construction. A leading case is Hutton *v.* The London and S. W. R. W. Co.[3] It was ruled in that case, in the event of damage to a party whose lands are not entered upon, but are injuriously affected by the exercise of the powers of a railway company upon their own lands or upon the lands of another party, and for which compensation is required to be made by section 6 of the Railway Clauses Consolidation Act, 8 Vict. c. 20, it is not unlawful for the company to execute the works which occasion the damage, before the amount of compensation for the same is ascertained, paid, or deposited. Under the Land Clauses Consolidation Act, 8 Vict. c. 18, in case of purchasing land, or damage directly consequent upon the purchase, the act is explicit. The damages in the latter case must be ascertained, and both price and damages must be paid before entry, but in regard to damages

[1] 62 Ill. 43. [2] 57 Id. 307. [3] 7 Hare, 26.

given by 8 Vict. c. 20, to one person, consequential upon the exercise of the powers of the company upon its own land or upon the land of other persons not complaining, a different rule prevails. The doctrine of Lester *v.* Lobley,[1] cited by the Vice-Chancellor, is that it is not unlawful for the company to commence work within its powers, which might be attended with damages to others, before making compensation for such expected damages. The reason given is, the impracticability in many cases of knowing whether damage will be sustained or not, and of measuring it if it were certain. Upon the authority cited, the conclusion of the court in Hutton *v.* The London and Southwestern R. W. Co., was, the acts of the company in proceeding to construct its works within its powers without first making compensation to the party claiming to have sustained consequential damages thereby were not unlawful, and hence there was no ground for the interference of a court of equity.

Our statute to provide for the exercise of the right of eminent domain admits of the same construction. Where lands have been taken for public use, the value of the land itself, and such damages as result directly from the taking to other lands of the owner not actually taken, must be assessed, and both price and damages paid or tendered before the right of entry exists, but where the damages are consequential upon the entry of the company upon its own lands or upon the lands of others not complaining, the rule is different. The company, in the latter case, is not bound to make compensation for expected damages before entering upon the work it has a lawful right to do under the powers conferred by its charter. The party will be left to his action. When he has settled the question of his right to damages, and ascertained the measure in an action at law, if any reason exists why he cannot have execution of the same, equity will assist him, but not before. Dunning *v.* City of Aurora ;[2] Bliss *v.* Kennedy.[3]

Holding, as we do, there is no ground for the interference of a court of equity, it will not be necessary to discuss any other question in the case. The injunction was properly denied, and the decree dismissing the bill will be affirmed.

Decree affirmed.[4]

[1] 7 A. & E. 124. [2] 40 Ill. 480. [3] 43 Id. 67.

[4] Hutton *v.* London Co., 7 Hare, 26; Osborne *v.* Mo. Co., 147 U. S. 248; McElroy *v.* Kansas City, 21 Fed. R. 257; Blodgett *v.* N. W. Co., 80 Fed. R. 601 (Illinois); Coffren *v.* Chicago Co., 84 Fed. R. 46 (Illinois); Atchison Co. *v.* Gen. Elect. Co., 112 Fed. R. 689 (Illinois — compare Gen. El. Co. *v.* Chicago, 107 Fed. R. 771); Denver Co. *v.* Domske, 11 Colo. 247; Denver Co. *v.* Barsaloux, 15 Colo. 290; Denver Co. *v.* Toohey, 15 Colo. 297; Haskell *v.* Denver Co., 23 Colo. 60; Patterson *v.* Chicago Co., 75 Ill. 588 (steam R. R.); Peoria Co. *v.* Schertz, 84 Ill. 135 (defendant insolvent); Truesdale *v.* Peoria Co., 101 Ill. 561; Penn Co. *v.* Heiss, 141 Ill. 35 (plaintiff's claim takes precedence of prior mortgage by the R. R. Co.); Parker *v.* Catholic Bishop, 146 Ill. 158; Corcoran *v.* Chicago Co., 149 Ill. 291; White *v.* West Side Co., 154 Ill. 620; Chicago Co. *v.* West Chicago Co., 156 Ill. 255; Doam *v.* Lake Co., 165 Ill. 510; People *v.* Gen. Elect. Co., 172 Ill. 129 (suit in name of Att'y-Gen., but in truth for benefit of private persons); Pa. Co. *v.* Chicago, 181 Ill. 289; Indiana Co. *v.* Conness, 184 Ill. 178, 180 (*semble*); Gen. Elect. Co. *v.* Chicago Co., 184 Ill. 588; McWethy *v.* Aurora Co., 202 Ill. 218; Tibbetts *v.* West Co., 54 Ill. Ap. 180; Stewart *v.* Chicago Co., 58 Ill. Ap. 446; Phelps *v.* Lake Co., 60 Ill. Ap. 471 (elevated R. R.) *Accord.* — Ed.

J. GALWAY *v.* THE METROPOLITAN ELEVATED RAILWAY CO.

COURT OF APPEALS, NEW YORK, OCTOBER, 1891.

[128 *New York Reports*, 132.]

RUGER, Ch. J.[1] This is one of the usual actions in equity to restrain the defendants from further maintaining and operating an elevated street railroad on Sixth Avenue in the city of New York adjacent to plaintiff's property, thereby unlawfully interfering with it.

This property consisted of five vacant lots, extending about one hundred and twenty-five feet along the easterly side of the avenue, between Fifty-seventh and Fifty-eighth streets, and was acquired by the plaintiff by purchase in and previous to 1871. The defendant, the Metropolitan Elevated Railway Company, commenced and completed the structure of its railroad between the months of January and July, 1878, and from the time of its completion to the commencement of this action, in 1889, it has, either by itself or through its lessee, The Manhattan Railway Company, continued to maintain and operate an elevated steam railroad in front of and adjoining the plaintiff's premises in Sixth Avenue. No proceedings were taken by the railroad to acquire the easements of the abutting owners in the avenue, or their consent to its construction previous to the commencement of this action.

The plaintiff complained that by reason of the operation of such railroad, in impairing the easements of light, air, and access to his premises, he had been damaged, and demanded judgment for such damages, as well as a perpetual injunction against the defendants from further operating and maintaining their railroad in front of his premises. A trial was had at Special Term, and the court declined to award pecuniary damages to the plaintiff, but rendered judgment granting the relief by injunction, unless the defendant should pay to the plaintiff, within a limited time, the sum of twenty thousand dollars as the depreciation of the value of the premises caused by the railroad, and upon such payment being made required the plaintiff to execute to the defendant a conveyance of the easements. The depreciation in the value of plaintiff's property by reason of the erection and maintenance of the railroad was found by the trial court to be twenty thousand dollars, and the evidence supported that finding. It was also found that the plaintiff saw the railroad in the course of construction in front of his premises, and, from time to time, saw what defendants were doing in respect thereto, and occasionally, as a passenger, rode upon it. He subscribed money to pay for counsel to prevent the erection of the road, but made no protest otherwise, and instituted no legal proceedings to enjoin its construction or opera-

[1] Only a portion of the opinion of the court is given. — ED.

tion prior to the commencement of this action. It was also found that after the commencement of this action, but before the trial, the defendants instituted proceedings for the condemnation of that part of the easements referred to which had been taken for the use of such railroad, and that such proceedings were pending undetermined at the time of the trial.

The defendants requested the trial court to find the following propositions of law: First. "That this action is barred by the Statute of Limitations;" and Second. "That plaintiff's alleged right of action is barred by his acquiescence in said railroad and its operation, and his use thereof as a passenger," and that he is estopped from maintaining the action. The court refused to find as requested, and it is conceded by the defendants that the exceptions to such refusal raise the only questions to be considered on this appeal.

It is claimed that the ten years Statute of Limitations commenced to run against an equity action from the time the plaintiff was first entitled to commence such action, and that period having elapsed that the plaintiff was barred from maintaining such action by section 388 of the Code of Civil Procedure. This section is the general statute adopted in the Code as a precautionary measure, to cover cases inadvertently omitted or otherwise unprovided for.

The general right of an abutting owner on a public street to recover damages for an unlawful invasion of his easements by the erection and maintenance of an elevated railroad in the street adjoining his premises is not contested by the defendants. Nor is the liability of the defendants to make compensation to the plaintiff for the injury inflicted upon his property by the construction and operation of their railroad disputed, or his right to maintain successive actions at law to recover damages for the injury to his easement; but it is claimed that he has lost the right to proceed in equity, not only by reason of the Statute of Limitations, but also by virtue of an equitable estoppel arising out of the alleged acquiescence in the admitted trespasses.

It is not claimed here that the plaintiff has ceased to be the owner of the easements impaired, or that any other party has acquired title thereto, but it is argued that he has lost the right to employ the equitable power of the courts by reason of his neglect to demand it within ten years from the time when a cause of action accrued. Thus, although the wrongful acts may be continued and the owner subjected to irreparable injury, and his legal remedy may be either inadequate or require that it should be sought through repeated and numerous actions at law, it is contended that the jurisdiction of an equity court shall be arrested at the very time when, in the interest of the public, the exercise of its power becomes the most apparent and necessary. This claim, we think, is altogether untenable. The right of abutting owners to damages for an invasion of their rights in the public streets is predicated upon the constitutional guarantees that no person shall be deprived of life, liberty, or property without due process of law, or have his property taken for public use without just compensation,

and it necessarily follows that so long as such person continues to be the owner of property and liable to be injured in respect thereto by the unlawful acts of others, he is entitled to invoke the protection of the fundamental law, without regard to the lapse of time that may occur before the commencement of legal proceedings, provided the remedy is claimed within the statutory period of limitation applicable to his legal right, or before adverse possession has barred his title to the property injured. Uline *v.* N. Y. C. & H. R. R. R. Co.,[1] Arnold *v.* H. R. R. R. Co.,[2] Colrick *v.* Swinburne,[3] Tallman *v.* M. E. R. R. Co.[4]

It is now the settled law of this state that no action at law can be maintained by an owner to recover prospective damages for injuries inflicted upon real property, and it is equally certain, we think, that an equity action for that purpose alone cannot be sustained. Uline *v.* N. Y. C. & H. R. R. R. Co.,[5] Pond *v.* Me. Elevated R. Co.[6]

Inasmuch as the equitable remedy depends, among other things, upon the existence of a legal cause of action, it follows that those facts which will bar the legal action will also afford an answer to the equitable remedy, and that so long as a legal remedy exists an equity court is open to aid in the enforcement of the legal claim.

Upon settled principles a court of equity had unquestioned jurisdiction by reason of the continuance of the legal right and the inadequacy of the legal remedy to render the judgment pronounced in this case by the trial court. Henderson *v.* N. Y. C. R. R. Co.,[7] Tallman Case.[8]

The jurisdiction of equity arises by reason of the necessity of repeated actions at law to redress the owner's grievance, and must, from the nature of the case, continue so long as that necessity exists.

It would, seem, therefore, that it is immaterial, either in equity or at law, whether the injuries done to the owner's property were originally intended by the wrong-doer to be perpetual and of a permanent character, or were of a temporary nature only and occasional in their operation. The law makes no distinction in the character of the injury, but prescribes one uniform principle for redress, without regard to the nature of the remedy pursued. Krehl *v.* Burrell,[9] Henderson's case,[10] Baldwin *v.* Calkins,[11] Williams *v.* N. Y. Central R. R. Co.

The defendants' chief contention is that the relief in equity as now given against elevated railroads for invasions of the rights of abutting owners in streets, is practically an action to recover permanent damages for such injuries, and that, therefore, the Statute of Limitations should commence to run from the time when any cause of action arose.

There would be some force in this argument were that the real character of the action, or if the equity courts had assumed to exercise the power of awarding damages on that theory, but we know of no instance in which they have done so in this state. The action here

[1] 101 N. Y. 98. [2] 55 Id. 661. [3] 105 Id. 503. [4] 121 Id. 123.
[5] 101 Id. 98. [6] 112 Id. 187. [7] 78 Id. 423. [8] 121 Id. 123.
[9] L. R. (11 Ch. Div.) 146. [10] 78 N. Y. 423. [11] 10 Wend. 170.

is neither in practice nor theory an action of such a character, and by its fundamental rules, as well as the constitutional requirement that compensation for such property shall be assessed by a jury or commission alone, an equity court is incapacitated from entertaining actions instituted for the purpose of recovering damages alone. Bradley *v.* Bosley,[1] Morss *v.* Elmendorf.[2]

A court of law is the exclusive tribunal for the determination of such actions. We have been referred to no case in this state where an equity court has assumed the authority to render judgment for prospective damages against a wrong-doer, and, we think, in the nature of the jurisdiction of such courts, a suit brought for such a purpose alone is not authorized. To say, therefore, that an action in which the plaintiff has no legal right to demand permanent damages, and the court owes no legal duty to award them, affords the owner an adequate remedy for such damages, is to pervert the plain character of the action. While equity courts have frequently suspended the remedy, as they did in this case, by injunction upon conditions, as for a specified time, or until the wrong-doer has been afforded an opportunity to condemn the property invaded, or has satisfied the owner's damages, they have never, to our knowledge, rendered judgment for such damages or authorized the collection thereof by the owner. The privilege of securing the right to continue the trespasses complained of has, when authorized, been granted as an act of grace and favor to the offending party, and not as matter of right to the injured owner. As was said in the Henderson case: "Equitable relief is awarded, not as the defendant's counsel claims, by way of menace or as a means of compelling the payment of money, but that the defendant may desist from an unauthorized use of the plaintiffs' property and forbear from any further interference with their rights."

Equity courts can, by virtue of their power to grant specific relief, obviate the difficulty attending an action at law in giving permanent damages for an injury to real property, by providing that a title to the easements required shall be conveyed as a condition of the relief granted.[3] The court, having the authority to grant a perpetual injunction, does not impair its exercise of such authority by permitting the offender to escape its effect by voluntarily paying the owner for the property injured. It is thus left optional with the trespasser to remedy the wrong done by him, or to suffer the judgment of the court to stand.

While the injury inflicted upon the wrong-doer by neglect to comply with the conditions may be so onerous, in many cases, as to inflict great loss upon him, it, nevertheless, does no more than place in his

[1] 1 Barb. Ch. 125. [2] 11 Paige, 277; Art. 1, § 7, Constitution.

[3] Northern Co. *v.* St. Paul Co., 4 Fed. R. 688; Columbus Co. *v.* Witherow, 82 Ala. 190; Harding *v.* Stamford Co., 41 Conn. 87; N. Y. Co. *v.* Fair Haven Co., 70 Conn. 610; Sparks Co. *v.* Newton, 57 N. J. Eq. 367; Grey *v.* Simmons, 60 N. J. Eq. 385; Story *v.* N. Y. Co. 90 N. Y. 122; Pappenheim *v.* Metrop. Co., 128 N. Y. 436; Gray *v.* Manhattan Co., 128 N. Y. 499 (*semble*); Hunter *v.* Manhattan Co., 141 N. Y. 281; Westphal *v.* N. Y., (N. Y. 1904) 69 N. E. R. 369; Auchincloss *v.* Metrop. Co., 69 N. Y. Ap. Div. 63 *Accord.* — Ed.

hands the means of escaping from the disastrous consequences of a judgment which has been rendered imperative by his own wrongful conduct. A party who voluntarily prosecutes a public enterprise for his own benefit, without regard to the legal rights of individuals who may be damaged by its operation, must always run a great risk of being placed in a dangerous situation through his unlawful conduct; but this is the result of his own volition, and the injury which necessarily follows such action cannot lawfully be imposed upon the parties injured without disregarding the constitutional provisions intended for their protection.

It furnishes no cause of complaint to the wrong-doer, that the court, having power to restrain him altogether from continuing his trespasses, should mitigate the severity of its judgment by authorizing him to repeat them upon complying with special conditions prescribed by the judgment, so long as it is left to his election to perform them or not.

We are, therefore, of the opinion that the right to bring an equity action to restrain continuous trespasses upon real estate is not barred in ten years from the time of the original trespass, but may be sustained if brought at any time so long as the plaintiff has title to the property injured, and a cause of action for such injuries is not barred at law.

But the defendants, failing to establish the bar of the Statute of Limitations, still insist that the affiliated principle of acquiescence constitutes a defence to the action. There is no foundation in the case for a claim that the plaintiff's conduct amounted to an estoppel, and, indeed, the claim is not seriously urged by the appellants. It is obvious that such conduct has never led the defendants into a line of action which they would not otherwise have pursued, or encouraged them to expend money or make improvements by reason of their reliance upon the alleged inaction or acquiescence of the plaintiff. They inaugurated their enterprise in the face of persistent opposition by the plaintiff and other abutting owners, and carried it to completion while earnest efforts were being made to prevent them.[1]

[1] In the following cases the conduct of the plaintiff in encouraging the defendant to make expenditures or otherwise to change his position deprived him of his right to an injunction against the continuance of a nuisance: Anon. 2 Eq. Ab. 522 (conduct barred action at law also); Birmingham Co. *v.* Lloyd, 18 Ves. 515; Williams *v.* Jersey, Cr. & Ph. 91 (conduct may bar action at law also); Rochdale Co. *v.* King, 2 Sim. N. S. 78; Wood *v.* Sutcliffe, 2 Sim. N. S. 163; Bankart *v.* Houghton, 27 Beav. 425 (*semble* — but conduct was no bar to action at law); Clifton Co. *v.* Dye, 87 Ala. 468; Bigelow *v.* Los Angeles, (Cal. 1904) 75 Pac. R. 111; Water Lot Co. *v.* Bucks, 5 Ga. 315; Thomas *v.* Woodman, 23 Kan. 217; Louisville Co. *v.* Warren, 78 Ky. 400; Byron *v.* Louisville Co., 22 Ky. L. Rep. 1007; Herr *v.* Central Co., 22 Ky. L. Rep. 1722; Jacox *v.* Clark, Walk. Ch. 249; Blake *v.* Cornwell, 65 Mich. 467; Miller *v.* Cornwell, 71 Mich. 270; Southard *v.* Morris Co., 1 N. J. Eq. 518; Higbee *v.* Camden Co., 20 N. J. Eq. 435; Att'y-Gen. *v.* Delaware Co., 27 N. J. Eq. 1; Traphagen *v.* Mayor, 29 N. J. Eq. 206; Meredith *v.* Sayre, 32 N. J. Eq. 557; Scharr *v.* Camden, (N. J. Eq. 1901) 49 Atl. R. 817; Goodall *v.* Crofton, 33 Oh. St. 271; Grey *v.* Ohio Co., 1 Grant, (Pa.) 412; Nesinger *v.* Clay Co., 203 Pa. 265; Stewart Co. *v.* Lehigh Co., 203 Pa. 474; Sprague *v.* Steere, 1 R. I. 247; Sheldon *v.* Rockwell, 9 Wis. 166; Heenan *v.* Dewar, 18 Grant, Ch. 438.

In the following cases, as in the principal case, the conduct of the plaintiff was not such

The case is entirely destitute of proof showing the existence of any elements of estoppel, and the defendants are, therefore, driven to rely, in this respect, upon the mere inaction of the plaintiff to prosecute his claim.

But this question we also think is governed by authority equally conclusive with that relating to the Statute of Limitations. The doctrine of acquiescence as a defence to an equity action has been generally limited here to those of an equitable nature exclusively, or to cases where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. Whatever may be the rule in other states, it can be said that here, no period of inaction merely has been held sufficient to justify a nuisance or trespass, unless it has continued for such a length of time as will authorize the presumption of a grant. The principle that so long as the legal right exists the owner is entitled to maintain his action in equity to restrain violations of this right, has been uniformly applied in this court. Tallman *v.* Met. El. R. Co.,[1] Arnold *v.* H. R. R. R. Co.,[2] Broiestedt *v.* S. S. R. R. Co.;[3] Campbell *v.* Seaman,[4] Ormsby *v.* Vt. Copper Mining Co.;[5] Haight *v.* Price;[6] Viele *v.* Judson;[7] N. Y. Rubber Co. *v.* Rothery;[8] Chapman *v.* City of Rochester.[9]

We have referred to a sufficient number of cases in this court to show how uniformly and frequently we have adhered to the doctrine, where a legal right is involved, and, upon grounds of equity jurisdiction, the courts have been called upon to sustain the legal right, that the mere *laches* of a party, unaccompanied by circumstances amounting to an estoppel, constitutes no defence to such an action.[10] Such is also the doctrine, generally, of the elementary writers. 2 Pomeroy's Eq. Jurisprudence, § 817; Bigelow on Estoppel, pp. 476 *et seq.*

The same general principle has also been held in England. In the case of Fullwood *v.* Fullwood,[11] Fry, Justice, says that "mere lapse of time unaccompanied by anything else has, in my judgment, just as much effect, and no more, in barring a suit for an injunction as it has in barring an action for deceit."

And the headnote in *In re* Maddever[12] reads: "That as the plaintiff was coming to enforce a legal right, his mere delay to take proceedings was no defence, as it had not continued long enough to bar his legal right; the case standing on a different footing from a suit to set aside, on equitable grounds, a deed which was valid at law."

as to bar his right to an injunction against the continuance of the nuisance: Imperial Co. *v.* Broadbent, 7 H. L. C. 600; Missouri *v.* Illinois District, 180 U. S. 208; Harding *v.* Stamford Co., 41 Conn. 87; Weston Co. *v.* Pope, 155 Ind. 394; Robinson *v.* Baugh, 31 Mich. 290; Stock *v.* Jefferson, 114 Mich. 357; Acquackanonk Co. *v.* Watson, 29 N. J. Eq. 366; Att'y-Gen. *v.* Paterson, 58 N. J. Eq. 1; N. Y. Co. *v.* Rothery, 107 N. Y. 310; Sprague *v.* Rhodes, 4 R. I. 301; Radenhurst *v.* Coate, 6 Grant, Ch. 139. — Ed.

[1] 121 N. Y. 123. [2] 55 N. Y. 661. [3] 55 N. Y. 220. [4] 63 N. Y. 568. [5] 56 N. Y. 623.
[6] 21 Id. 241. [7] 82 Id. 32. [8] 107 Id. 310. [9] 110 Id. 273.

[10] Burden *v.* Stein, 27 Ala. 104; Carlisle *v.* Cooper, 21 N. J. Eq. 576; Campbell *v.* Seaman, 63 N. Y. 568; Ackerman *v.* True, 175 N. Y. 353; Radenhurst *v.* Coate, 6 Grant, Ch. 139 *Accord.* — Ed.

[11] L. R. (9 Ch. Div.) 176. [12] L. R. (27 Ch. Div.) 523.

For the reasons stated, we think the judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

L. JAGER, JR. *v.* THE CITY OF NEW YORK.

SUPREME COURT, APPELLATE DIVISION, NEW YORK, OCTOBER, 1902.

[75 *New York Appellate Division Reports*, 258.]

HIRSCHBERG, J. The plaintiff sues for past damages and a permanent injunction restraining the operation of the defendant's pumps and driven wells. The case was tried before the decision by this court in the case of Reisert *v.* City of New York,[1] and the learned trial justice permitted the plaintiff, against the defendant's objection, to establish his damages by proof of the injury inflicted on his crops, and the loss of profits thereby occasioned. The defendant by not appealing has acquiesced in the result, but the plaintiff on this appeal insists that the amount of damages found by the court is inadequate, and asks that such amount should be increased here and judgment directed accordingly. He does not ask for a new trial on which the rule of diminution of rental value would be applied as the measure of damages in accordance with the determination in the Reisert Case.[2]

The evidence taken is quite voluminous, and the court below has been evidently influenced to some extent by the appearance and demeanor of the witnesses in making the assessment of damages. Assuming that the figure reached is not as high as the evidence taken would warrant, but without expressing any opinion on that subject, I do not think it would be just under the circumstances for an appellate court to increase the amount of an award which is based on erroneous principles. There is no proof in the case of the effect, if any, which the defendant's trespass has had upon the plaintiff's property in respect of rental value, and the recovery in question may be largely in excess of what the plaintiff would be entitled to recover under the correct rule of damages. Notwithstanding the decision is in the short form authorized by section 1022 of the Code of Civil Procedure, it is not within the province of this court to reassess the damages upon disputed and conflicting testimony. Benedict *v.* Arnoux,[3] Snyder *v.* Seamen.[4] Neither party desiring a reversal and a new trial, it would seem proper under the peculiar circumstances of the case that the judgment in so far as it assesses the plaintiff's past damages should be affirmed.

The plaintiff offered no proof of monetary fee damage, and the court below refused injunctive relief. This the plaintiff claims was error, and

[1] 69 App. Div. 302.
[2] 69 App. Div. 302.
[3] 154 N. Y. 715, 726.
[4] 157 N. Y. 449, 453.

it is asserted in his behalf that inasmuch as the trespass has resulted in the infliction of substantial damage, and as the defendant may otherwise acquire immunity by prescription, he is entitled to an injunction as an absolute right. The difficulty in the way of adopting this view as to the first claim arises from the fact that the plaintiff has not proved the existence of either fee or rental damage under the rules of law as now settled by the Reisert Case,[1] and the reasoning of the Court of Appeals in the case of O'Reilly *v.* N. Y. Elevated R. R. Co.,[2] addressed to a somewhat similar situation, is, therefore, applicable. In that case Judge Gray said (p. 357): "A court of equity has a certain latitude in the exercise of its great power, and under no authority or rule, with which I am acquainted, is it compelled to grant an injunction in a case like the present one; which belongs to a peculiar class and is governed by a doctrine of recent growth in the courts. The court recognizes the fact that the defendants had the right to appropriate the street easements by condemnation proceedings, and, hence, when appealed to, to enjoin them from operating their franchises, it looks into the question of the substantial nature of the damage alleged to have been done to the property, or of the loss suffered by the owner. If it is found to be such, then the court proceeds in the matter as though the proceeding was one to condemn to the defendants' uses the property appropriated, and, having ascertained the value of the property, it suspends the decree, which it finds the plaintiff is entitled to, to restrain the continuance of the defendants' acts, for a sufficient period within which to permit the defendants to acquire the right to appropriate the easements through a conveyance as a condition of avoiding the enforcement of the decree. The proceedings by which the court ascertains and fixes the damages done to the abutting property in the deprivation of easements, are, in fact, but a substitute for condemnation proceedings. If the plaintiffs fail to establish that substantial injury had been inflicted upon their property, a decree enjoining the operation of the railroad would be unwarranted.[3] One of the very grounds, and a main one, upon which equity proceeds in granting relief, by way of injunction against the unlawful acts of the defendants, would have been wanting if no actual and irreparable damage were shown."

In this case the court cannot take judicial notice of the fact that the plaintiff's property as such has sustained damage. As I have said, there is no proof of loss of fee value and no lawful proof of diminution in rental value. The damages which have been recovered have been established upon what has been adjudged to be an illegal basis and cannot be made the foundation for injunctive relief. In order, however, to preserve the plaintiff's rights, if in fact fee and rental

[1] 69 App. Div. 302. [2] 148 N. Y. 347.

[3] Gray *v.* Manhattan Co., 128 N. Y. 499, 509 (*semble*); Bohn *v.* Metrop. Co., 129 N. Y. 576; O'Reilly *v.* N. Y. Co., 148 N. Y. 347; Bookman *v.* Elev. Co., 147 N. Y. 298; Garvey *v.* Long Island Co., 159 N. Y. 323, 333 (*semble*); Wormser *v.* Brown, 149 N. Y. 163, 173 (*semble*); Kornder *v.* Kings Co., 61 N. Y. Ap. Div. 439; Purdy *v.* Manhattan Co., 36 N. Y. St. Rep. 43 *Accord.* — Ed.

value have been injured, as well as to prevent the possibility of the defendant acquiring a prescriptive right in the future, the judgment appealed from may well be modified in accordance with that in the O'Reilly Case,[1] so as to leave it entirely open to the plaintiff in the future, and before the defendant could acquire any adverse rights if he is able to prove any actual damage or loss, to commence another action against the defendant and to obtain such relief at law or in equity as the case may warrant. For that purpose the judgment appealed from should be modified by adding the following: "This judgment is without prejudice to the right of the plaintiff to bring such action as he may hereafter be advised, based upon facts not inconsistent with those herein adjudged," and as so modified affirmed, without costs of the appeal.

All concurred.

Judgment modified in accordance with opinion of HIRSCHBERG, J., and as modified affirmed, without costs of this appeal.

T. W. EDWARDS *v.* THE ALLOUEZ MINING CO.

SUPREME COURT, MICHIGAN, JANUARY 9, 1878.

[38 *Michigan Reports*, 46.]

COOLEY, J.[2] This is an injunction bill and the facts are very simple. Defendant at a cost of some sixty thousand dollars erected a stamp mill on the banks of Hill Creek in the year 1874, and has since been operating it for copper mining purposes. As a result of its operations large quantities of sand are carried down by the waters of the stream and deposited on the bottom lands below. The evidence leads to the belief that it would be impossible to carry on the mining operations of the defendant with profit unless that is permitted. The year following the erection of defendant's mill complainant purchased a piece of land through which the creek runs a short distance below the mill, and upon which the mill as operated was depositing sand. The land was not purchased for use or occupation, but as a matter of speculation, and apparently under an expectation of being able to force the defendant to buy it at a large advance on the purchase price. It was offered to defendant soon after the purchase, and though no price was named, the valuation which has been put upon it by complainant and his witnesses is from three to five times what it cost him, and this perhaps gives some indication what his expectations were. The real value of the land, except as a convenience in the business of defendant, would seem to have been small. When defendant declined to purchase, this bill was

[1] 148 N. Y. 347.

[2] Only a portion of the opinions of Cooley, J., and Campbell, C. J., are given. — ED.

filed. The prayer is that defendant be restrained from running or depositing its stamp sand on complainant's land, and from polluting the waters of the stream by its operations. The circuit judge refused the injunction prayed for, but ordered a reference to a jury for an assessment of damages.

There is no doubt that the operations of defendant, whether they inflict any serious injury on complainant or not, amount in effect to an appropriation of that portion of his property upon which sand is being deposited. Ashley *v.* Port Huron;[1] Pumpelly *v.* Green Bay Co.;[2] Arimond *v.* Green Bay Co.;[3] Rowe *v.* Portsmouth;[4] Woodward *v.* Worcester.[5] It follows and is beyond question that complainant sustains a legal injury for which he is entitled to suitable redress. The only question on this record is, whether he is entitled to the special redress he seeks, namely, an injunction.

The land injured in this case was bought by the complainant with a preconceived purpose to force a sale of it upon the defendant. He did not want it for a homestead or for business property, but for the money he could compel the defendant to pay for it. It may be said that no one is concerned with the motives of another in making a lawful purchase, or in doing any other lawful act; and this is true as a rule, but it is not true universally. Wherever one keeps within the limits of lawful action, he is certainly entitled to the protection of the law, whether his motives are commendable or not; but if he demands more than the strict rules of law can give him, his motives may become important. In general it must be assumed that the rules of the common law will give adequate redress for any injury; and when the litigant avers that under the circumstances of his particular case they do not, and that therefore the gracious ear of equity should incline to hear his complaint, it may not be amiss to inquire how he came to be placed in such circumstances. If a man invites an injury, he may still have his redress in the courts of law, but his prayer for the special interposition of equity on the ground that what he invited and expected was about irreparably to injure, would not be likely to trouble the judicial conscience very much if it were wholly ignored. The Supreme Court of Connecticut not long since felt compelled, under circumstances very similar to those shown by this record, to look into the motives of a corporation in making a purchase with a view to litigation, and to deny relief upon the ground that an acquisition of land for such a purpose was *ultra vires.* Occum Co. *v.* Sprague Manufacturing Co.[6] We cannot say in this case that complainant had no right to buy, but we can say, as we do, that when he comes demanding strict legal rights, he shall have those, but no more. He is entitled to his rights under the rules of law, but he is entitled to nothing of grace.

The land having been bought to make money from by sale, a legal award of damages for an injury to it, is in furtherance of the purpose

[1] 35 Mich. 296. [2] 13 Wall. 166. [3] 31 Wis. 316.
[4] 56 N. H. 291. [5] 121 Mass. 245. [6] 34 Conn. 540.

of the purchase, and therefore a suitable and a just redress. Defendant is not alleged to be irresponsible, and a jury, it is supposed, will award all that is reasonable. If complainant wants more than is reasonable, he has a right to obtain it under the rules of law, but he cannot demand the aid of equity in a speculation. If in speculative language he has a corner in real estate, there is no greater reason why he should have the assistance of an injunction to aid his schemes than there would be if on the produce exchange he had effected a corner in grain. Without the writ in either case he may be the sufferer, but he suffers nothing for which damages cannot compensate him. The elements of irreparable injury are entirely wanting to his case.

Our conclusion is that the circuit court gave the complainant all he was entitled to when the case was sent to a jury. The decree must therefore be affirmed with costs.

GRAVES, J. I concur in affirming the decree.

CAMPBELL, C. J. I cannot concur in the doctrine that any one's rights of this kind are subject to judicial discretion. The rights to equitable relief, where that is the only adequate remedy, are as absolute as to legal relief. The one remedy is no more sacred than the other, and no more capable of lawful denial. If the defendants were to take possession of the land in question by putting a tenant upon it, no power would exist anywhere to deny complainant his possessory remedy. Where the same sort of wrong is done by indirect assumption of possession, so that all the advantages of actual possession are enjoyed by the wrong-doer without going in person upon the soil, there is no reason for denying the only remedy which can secure to complainant the future enjoyment of his own estate, which would not as justly authorize the refusal of a possessory remedy in the other case. And no remedy at law is adequate for such a grievance as is here complained of, because no legal remedy can secure complainant the use of his own property.

It is not claimed, and there is certainly no ground for claiming, that there is any equitable estoppel. Defendants have never acted on any belief that they had a right to do what they are doing. They have always known they were wrong-doers, and have simply presumed on the patience of their neighbors, and neglected to purchase what they could originally have purchased if they had chosen. Neither does the proof show any very serious difficulty in the way of avoiding the mischief, although I do not regard this as at all essential. It is not denied by complainant that he purchased for speculative purposes. As every one has a right to do this if he chooses, it cannot in any way lessen his claims to protection. It would be, I think, a very dangerous principle to hold that a civil wrong can be lessened by the motives of the party injured, so long as he has done no wrong himself. The property of one man is as much entitled to protection as that of another, — not because he bought it or intends to use it without selfish motives, but because it is property. Any attempt

to discriminate would, in my opinion, leave private interests subject to a discretion which no man could calculate upon, and make the judicial conscience the only arbiter of every one's rights. Some courts may have acted on this notion, but it seems to me that such precedents are unjust, and are not consistent with law or equity as we have received them under our constitutional guaranties of protection to person and property.

I think the court below should have granted a perpetual injunction as prayed.

MARSTON, J., did not sit in this case.[1]

[1] In Brutsche *v.* Bowers, (Iowa, 1904) 97 N. W. R. 1076, one of the grounds for refusing a mandatory injunction for the removal of a fence from the highway, was the fact that the plaintiff maintained a similar fence in the same highway. — ED.

MISCELLANEOUS CASES OF INJUNCTIONS AGAINST NUISANCES.

The extensive development, during the last century, of the remedy by injunction against nuisances appears from the following cases in which the preventive relief of equity was granted: —

Diversion, obstruction, abstraction, or pollution of running water. — Menzies *v.* Breadalbane, 3 Bligh, N. S. 414; Atty.-Gen. *v.* Birmingham, 4 K. & J. 528; Lingwood *v.* Stow Co., L. R. 1 Eq. 77; Goldsmid *v.* Tunbridge Wells, 1 Ch. Ap. 349, L. R. 1 Eq. 161; Atty.-Gen. *v.* Colney Hatch, 4 Ch. 146; Atty.-Gen. *v.* Leeds Corp., 5 Ch. 583; Bennington *v.* Brinsop Co., 5 Ch. D. 769; Metrop. Works *v.* London Co., 17 Ch. Div. 246; Atty.-Gen. *v.* Acton Board, 22 Ch. D. 222; Herron *v.* Rathmines Co., [1892] A. C. 498; McIntyre *v.* McGavin, [1893] A. C. 268; Baily *v.* Clark, [1902] 1 Ch. 649; Webb *v.* Portland Co., 3 Sumn. 190; Indianapolis Co. *v.* American Co., 53 Fed. R. 970, 84 Fed. R. 1014; Carmichael *v.* Texarkana, 94 Fed. R. 561 (*semble*); Pine *v.* Mayor, 103 Fed. R. 337; Farris *v.* Dudley, 78 Ala. 124; Logan *v.* Driscoll, 19 Cal. 623; Courtwright *v.* Bear Co., 30 Cal. 573; Evans *v.* Ross, (Cal. 1885) 8 Pac. R. 88; Cloverdale *v.* Smith, 128 Cal. 230; Hayes *v.* Silver Co., 136 Cal. 238; Medano Co. *v.* Adams, 29 Colo. 317; Mabee *v.* Platte Co., (Colo. Ap. 1902) 68 Pac. R. 1058; Platt *v.* Waterbury, 72 Conn. 531; Gibson *v.* New Milford, 72 Conn. 561; Butler *v.* Mayor, 74 Ga. 570; Hicks *v.* Silliman, 93 Ill. 255; Anderson *v.* Henderson, 124 Ill. 164; Graham *v.* Keene, 143 Ill. 425; Barrett *v.* Mt. Greenwood, 159 Ill. 385; Jewett *v.* Sweet, 178 Ill. 96; Kewanee *v.* Otley, 204 Ill. 402; Mason *v.* Mattoon, 95 Ill. Ap. 525; Pence *v.* Garrison, 93 Ind. 345; Weston Co. *v.* Pope, 155 Ind. 394; Moore *v.* Chicago Co., 75 Iowa, 263; Holmes *v.* Calhoun Co., 97 Iowa, 360; Kirkendall *v.* Hunt, 4 Kan. 514; Schumacher *v.* Shawhan, (Can. Ap. 1902) 67 S. W. R. 717; Hahn *v.* Thornberry, 7 Bush, 403; West Co. *v.* Mt. Hope, (Md. 1903) 54 Atl. R. 982; Fahnstock *v.* Feldner, (Md. 1903) 56 Atl. R. 785; Bemis *v.* Upham, 13 Pick. 169; Hill *v.* Sayles, 12 Cush. 454; Merrifield *v.* Lombard, 13 All. 16; Harris *v.* Mackintosh, 133 Mass. 228; Potter *v.* Howe, 141 Mass. 357; Sprague *v.* Dorr, (Mass. 1904) 69 N. E. R. 344; White *v.* Forbes, Walk. Mich. 112; Mastenbrook *v.* Alger, 110 Mich. 414; Stock *v.* Jefferson, 114 Mich. 357, (1902, Mich.) 92 N. W. R. 769; Hyatt *v.* Albro, 121 Mich. 638; Morrill *v.* St. Anthony Co., 26 Minn. 222; Carlson *v.* St. Louis Co., 73 Minn. 128; Sanborn *v.* People's Co., 82 Minn. 43; Stillwater Co. *v.* Farmer, (Minn. 1903) 93 N. W. R. 907; Whitfield *v.* Rogers, 26 Miss. 84; Learned *v.* Hunt, 63 Miss. 373; Le Flore Co. *v.* Cannon, 81 Miss. 334; Barton *v.* Union Co., 28 Neb. 350; Anheuser Assn. *v.* Peterson, 41 Neb. 897; Jacobson *v.* Van Boening, 48 Neb. 80; Farmers Co. *v.* Cozed Co., (Neb. 1902) 90 N. W. R. 951; Todd *v.* York, (Neb. 1902) 92 N. W. R. 1040; Meng *v.* Coffey, (Neb. 1902) 93 N. W. R. 713; McCook Co. *v.* Crews, (Neb. 1903) 96 N. W. R. 996; Brown *v.* Ashley, 16 Nev. 311; Shields *v.* Orr Co., 23 Nev. 349; Shreve *v.* Voorhees, 3 N. J. Eq. 25; Shields *v.* Arndt, 4 N. J. Eq. 234, 21 N. J. Eq. 581 *cited;* Holsman *v.* Boiling Spring, 14 N. J. Eq. 335; Carlisle *v.* Cooper, 21 N. J. Eq. 576; Higgins *v.* Fleming Co., 36 N. J. Eq. 538; Beach *v.* Sterling Co., 54 N. J. Eq. 65; Atty.-Gen. *v.* Paterson, 58 N. J. Eq. 1; Simmons *v.* Patterson, 60 N. J. Eq. 385; Starr *v.* Woodbury, (N. J. Eq. 1901) 48 Atl. R. 911; Murray *v.* Pannaci, 64 N. J. Eq. 147; Doremus *v.* Mayor, (N. J. Eq. 1903) 55 Atl. R. 304; Smith *v.* Rochester, 92 N. Y. 463; Mudge *v.* Salisbury, 110 N. Y. 413; Gilzinger *v.* Saugerties Co., 66 Hun, 173 (affirmed 142 N. Y. 633); Butler *v.* White Plains, 59 N. Y. Ap. Div. 30;

Sammons *v.* Gloversville, 81 N. Y. Ap. Div. 332; Brown *v.* Ontario Co., 81 N. Y. Ap. Div. 273; Gale *v.* Syracuse, 35 N. Y. Misc. Rep. 465; Cox *v.* Bernard, 39 Oreg. 53; Mace *v.* Mace, 40 Oreg. 586; Construct. Co. *v.* Ditch Co., 41 Oreg. 209; Scheetz's Ap., 35 Pa. 88; Keppel *v.* Lehigh Co., 200 Pa. 649; Sprague *v.* Rhodes, 4 R. I. 301; Miner *v.* Nichols, 24 R. I. 199; Lone Co. *v.* Rapid Co., (S. Dak. 1903) 93 N. W. R. 650; Vaughn *v.* Law, 1 Humph. 123; Wall *v.* Cloud, 3 Humph. 181; Donovan *v.* Royal, 26 Tex. Civ. Ap. 248; Lyon *v.* McLaughlin, 32 Vt. 423; Hunter *v.* Coalter, 4 Rand. 58 (*semble*); Switzer *v.* McCulloch, 76 Va. 777; Masonic Assn. *v.* Banks, 94 Va. 695; Longmire *v.* Smith, 26 Wash. 439; Fox Co. *v.* Kelley, 70 Wis. 287; Kimberly Co. *v.* Hewitt, 75 Wis. 371, 79 Wis. 334; Case *v.* Hoffman, 84 Wis. 438; Koenig *v.* Watertown, 104 Wis. 409; Winchell *v.* Waukesha, 110 Wis. 101; Commissioners *v.* Blackrock, Ir. R. 10 Eq. 160; Robertson *v.* Stewart, Court of Sess. Dec. 6, 1872.

Obstruction of highway or navigation. — Atty.-Gen. *v.* Gr. East. Co., 6 Ch. 572; Original Co. *v.* Gibb, 5 Ch. D. 713; Atty.-Gen. *v.* Brighton, [1900] 1 Ch. 276; Griffing *v.* Gibb, 2 Black, 519; Demopolis *v.* Webb, 87 Ala. 659; Whaley *v.* Wilson, 112 Ala. 627; Roberts *v.* Matthews, 137 Ala. 523; Draper *v.* Mackey, 35 Ark. 497; Texarkana *v.* Leach, 66 Ark. 40; Schaufele *v.* Doyle, 86 Cal. 107 (change of grade); Hargro *v.* Hodgdon, 89 Cal. 623; Geurkink *v.* Petaluma, 112 Cal. 306; Kavanagh *v.* Mobile Co., 78 Ga. 271; Field *v.* Barling, 149 Ill. 556; Young *v.* Rothrock, (Iowa, 1903) 96 N. W. R. 1105; Douglass *v.* Leavenworth, 6 Kan. Ap. 96; Ellison *v.* Louisville, 17 Ky. L. Rep. 593, 31 S. W. Rep. 723, s. c.; Van Witsen *v.* Gutman, 73 Md. 405; Townsend *v.* Epstein, 90 Md. 537; Mayor *v.* Wineland, (Md. 1904) 56 Atl. R. 811; Albert Lee *v.* Knatvold, (Minn. 1903) 95 N. W. Rep. 309; Rowzee *v.* Pierce, 75 Miss. 846 (disfiguring a park); Dubach *v.* Hannibal Co., 89 Mo. 483; Lockwood *v.* Wabash Co., 122 Mo. 87; Schulenburg *v.* St. Louis Co., 129 Mo. 455; Sherlock *v.* Kansas Co., 142 Mo. 172; Callanan *v.* Gilman, 107 N. Y. 360; Bates *v.* Holbrook, 171 N. Y. 460 (affirming 67 N. Y. Ap. Div. 25); Ackerman *v.* True, 71 N. Y. Ap. Div. 143; O'Dell *v.* Bretney, 38 N. Y. Misc. Rep. 67 (*semble*); Railway Co. *v.* Lawrence, 38 Oh. St. 41; Zork *v.* Pa. Co., 206 Pa. 603 (change of grade); Richi *v.* Chattanooga Co., 105 Tenn. 651 (surface R. R.); Dooly Block *v.* Salt Lake Co., 9 Utah, 31; Cereghino *v.* Oregon Co., (Utah, 1903) 73 Pac. R. 634; Brown *v.* Seattle, 5 Wash. 35 (changing grade); Schwede *v.* Hemrich, 29 Wash. 21 (surface R. R.); Kakeldy *v.* Hemrich, 29 Wash. 733 (surface R. R.); Keystone Co. *v.* Summers, 13 W. Va. 476; Walker *v.* Shepardson, 2 Wis. 384; Barnes *v.* Racine, 4 Wis. 454; Pettibone *v.* Hamilton, 40 Wis. 402; Younkin *v.* Milwaukee Co., 112 Wis. 15 (surface R. R.).

Gases, smoke, heat, effluvia; sewage, drainage, and the like. — Pollock *v.* Lester, 11 Hare, 266; Walter *v.* Selfe, 4 DeG. & Sm. 315; Crump *v.* Lambert, L. R. 3 Eq. 409; Broder *v.* Saillard, 2 Ch. Div. 692; Shotts Co. *v.* Inglis, 7 App. Cas. 518; Fleming *v.* Hislop, 11 App. Cas. 686; Reinhart *v.* Mentasti, 42 Ch. D. 685 (but see Sanders-Clark *v.* Grosvenor, [1900] 2 Ch. 373); Rapier *v.* London Co., [1893] 2 Ch. 588; Atty.-Gen. *v.* Cole, [1900] 1 Ch. 205; Mo. *v.* Ill., 180 U. S. 208 (sewage); Hundley *v.* Harrison, 123 Ala. 292; Richards *v.* Daugherty, 133 Ala. 569; Fisher *v.* Zumwalt, 128 Cal. 493; Norwood *v.* Dickey, 18 Ga. 528; Ga. Co. *v.* Colquitt, 72 Ga. 172; Minor *v.* De Vaughn, 72 Ga. 208; Mayor *v.* Howe, 113 Ga. 963; Wahle *v.* Reinbach, 76 Ill. 322; Minke *v.* Hoffman, 87 Ill. 450; Dierks *v.* Commissioners, 142 Ill. 197; Smith *v.* Fitzgerald, 24 Ind. 316; Owen *v.* Phillips, 73 Ind. 284; Reichert *v.* Geers, 98 Ind. 73; Radican *v.* Buckley, 138 Ind. 582; Cook *v.* Benson, 62 Iowa, 170; Bushnell *v.* Robeson, 62 Iowa, 540; Rhoades *v.* Cook, (Iowa, 1904) 98 N. W. R. 122; Miley *v.* A'Hearn, 13 Ky. L. R. 834, 18 S. W. Rep. 528, s. c.; Fuselier *v.* Spalding, 2 La. An. 773; State *v.* Judge, 46 La. An. 78; Adams *v.* Michael, 38 Md. 123 (*semble*); Boston Co. *v.* Hills, 159 Mass. 147; Robinson *v.* Baugh, 31 Mich. 290; Ballentine *v.* Webb, 84 Mich. 38; Northwood *v.* Barber Co., 126 Mich. 284; Holke *v.* Herman, 87 Mo. Ap. 125; Lowe *v.* Prospect Cemetery Assoc., 58 Neb. 94; Andrews *v.* Steele City, (Neb. 1902) 89 N. W. R. 739; Cleveland *v.* Citizen's Co., 20 N. J. Eq. 201; Williams *v.* Osborne, 40 N. J. Eq. 235; Pa. Co. *v.* Angel, 41 N. J. Eq. 316; Leeds *v.* Bohemian Works, 63 N. J. Eq. 619; Starr *v.* Woodbury Works, (N. J. Eq. 1901) 48 Atl. R. 911; Adams *v.* Popham, 76 N. Y. 410; Cogswell *v.* N. Y. Co., 103 N. Y. 10; Bohan *v.* Port Jervis Co., 122 N. Y. 18; Kavanagh *v.* Barber, 131 N. Y. 211 (*semble*); Garvey *v.* Long Island Co., 159 N. Y. 323; Rosenheimer *v.* Standard Co., 39 N. Y. Ap. Div. 482; Finkelstein *v.* Huner, 77 N. Y. Ap. Div. 424; Mulligan *v.* Elias, 12 Abb. Pr. N. S. 259 (Brooklyn City Ct.); Atty.-Gen. *v.* Blount, 4 Hawks, 384; Atty.-Gen. *v.* Hunter, 1 Dev. Eq. 12; Clark *v.* Lawrence, 6 Jones Eq. 83; Pa. Co.'s App., 96 Pa. 116; Rodenhausen *v.* Craven, 141 Pa. 546; Evans *v.* Reading Co., 160 Pa. 209; Richardson *v.* Oberholtzer, 2 W. N. (Pa.) 332; Warwick *v.* Wah Lee, 10 Phila. 160; Aldrich *v.* Howard, 7 R. I. 87; Pierce *v.* Gibson Co., 107 Tenn. 224; Burditt *v.* Swenson, 17 Tex. 489; Jung *v.* Neraz, 71 Tex. 396; Miller *v.* Trueheart, 4 Leigh, 569; Amick *v.* Tharp, 13 Gratt. 564;

Pruner *v.* Pendleton, 75 Va. 516; Peters *v.* Lewis, 28 Wash. 366; Wenlandt *v.* Cavanagh, 85 Wis. 256; Price *v.* Oakfield Co., 87 Wis. 536; Middlestadt *v.* Waupaca Co., 97 Wis. 553; Rogers *v.* John Co., (Wis. 1903) 93 N. W. R. 821.

Noise or vibration. — Walker *v.* Brewster, 5 Eq. 25 (noisy entertainment); Gaunt *v.* Fynney, 8 Ch. 8 (steam engine); Bellamy *v.* Wells, 60 L. J. Ch. 156 (noisy entertainment); Phillips *v.* Thomas, 6 Times L. R. 327 (noisy entertainment); Christie *v.* Davey, [1893] 1 Ch. 316 (musical instruments); Knight *v.* Isle of Wight Co., 20 Times L. R. 173 (machinery); Colwell *v.* St. Pancras, 20 Times L. R. 236 (machinery); Hill *v.* McBurney Co., 112 Ga. 788 (factory whistle); Kissel *v.* Lewis, 156 Ind. 233 (beer garden); Tron *v.* Lewis, (Ind. Ap. 1903) 66 N. E. R. 490 (beer garden); Froehlicher *v.* Oswald Iron Works, (La. 1903) 35 So. R. 821 (machinery); Dittman *v.* Repp, 50 Md. 517 (machinery); Leeds *v.* Bohemian Co., 63 N. J. Eq. 619 (machinery); Gilbough *v.* West Co., 64 N. J. Eq. 27 (Sunday ball games); Garvey *v.* Long Island Co., 159 N. Y. 323 (locomotive turn-table); Dennis *v.* Eckhart, 3 Grant (Pa.) 390 (hammering and pounding); Briggs *v.* Vottler, 4 W. N. (Pa.) 272 (bowling-alley); Burke *v.* Myers, 10 W. N. (Pa.) 481 (machinery); Dillon *v.* States, 11 W. N. (Pa.) 18 (machinery); Snyder *v.* Cabell, 29 W. Va. 48 (skating rink); Rogers *v.* John Co., (Wis. 1903) 93 N. W. R. 821.

Removing support of land. — Hunt *v.* Peake, Johns. 705; Siddons *v.* Short, 2 C. P. D. 572; Birmingham *v.* Allen, 6 Ch. Div. 284; Victor Co. *v.* Morning Co., 50 Mo. Ap. 525 (*semble*); Carpenter *v.* Reliance Co., (Mo. Ap. 1903) 77 S. W. R. 1004 (*semble*); Lasala *v.* Holbrook, 4 Paige 169 (*semble*); Farrand *v.* Marshall, 19 Barb. 380, 21 Barb. 409.

See the analogous cases of inroad by the sea from the digging of sand from the beach. Atty.-Gen. *v.* Tomline, 14 Ch. Div. 58; Murray *v.* Pannaci, 64 N. J. Eq. 147.

Spreading roots. — Brock *v.* Conn. Co., 35 Vt. 373.

Small-pox hospitals, blasting, powder magazine, and similar dangers. — Metrop. Asylum *v.* Hill, 6 App. Cas. 196 (small-pox hospital); McMurray *v.* Cadwell, 6 Times L. R. 76 (explosive factory); Savery *v.* London Corp., 8 Times L. R. 192 (electric light distributing station); Ellis *v.* Blue Mt. Assn., 69 N. H. 385 (wild animals in Corbin park); Heeg *v.* Licht, 80 N. Y. 579 (powder magazine); Davis *v.* Niagara Co., 171 N. Y. 336 (ice on a high building); Gilford *v.* Babies Hospital, 21 Abb. N. C. 159 (hospital for contagious diseases); Brennan *v.* Schremer, (N. Y. Sup'r Ct. 1892) 28 Abb. N. C. 481 (blasting); Wier's Ap., 74 Pa. 230 (powder-house); Comminge *v.* Stevenson, 76 Tex. 642 (powder magazine).

Houses of ill-fame and other acts offensive to the moral sense. — Hamilton *v.* Whitridge, 11 Md. 128; Crawford *v.* Tyrrell, 128 N. R. 341; Blagen *v.* Smith, 34 Oreg. 394; Weakley *v.* Page, 102 Tenn. 178; Hayden *v.* Tucker, 37 Mo. 214 (standing of stallions in view of plaintiff's house); Farrell *v.* Cook, 16 Neb. 483 (like preceding case).

Spite fences. — Harbison *v.* White, 46 Conn. 106; Gallagher *v.* Dodge, 48 Conn. 387 (*semble*); Whitlock *v.* Smith, 75 Conn. 423; Burke *v.* Smith, 69 Mich. 380; Flaherty *v.* Moran, 81 Mich. 52; Kirkwood *v.* Finegan, 95 Mich. 543; Peek *v.* Rog, 110 Mich. 52; Horan *v.* Byrnes, (N. H. 1903) 54 Atl. R. 945; Peck *v.* Bowman, (Ohio Cuyahoga Co. C. P. 1889) 22 W. L. Bull, 111 (overruled by Letts *v.* Kessler, 54 Oh. 73); Karasek *v.* Peier, 22 Wash. 419.

Injunctions refused. — In the following cases, because of insufficient evidence that a nuisance would be committed or continued, relief by injunction was denied. Baines *v.* Baker, Amb. 158, 3 Atk. 750, s. c. (small-pox hospital); Squire *v.* Campbell, 1 My. & Cr. 459, 486 (statue in a square); Haines *v.* Taylor, 10 Beav. 75, 2 Ph. 209 (gas works); Ware *v.* Regent's Canal, 3 De G. & J. 212 (flooding); Atty.-Gen. *v.* Mayor, 13 W. R. 888 (pollution); Gort *v.* Clark, 16 W. R. 569 (noise); Salvin *v.* North Co., 9 Ch. 705 (effluvia); Atty.-Gen. *v.* Cockermouth, 18 Eq. 172 (pollution); Sandwich *v.* Gr. North Co., 10 Ch. D. 707 (diversion of water); Kensit *v.* Gr. East. Co., 27 Ch. Div. 122, 23 Ch. D. 566 (small-pox hospital); Fletcher *v.* Bealey, 28 Ch. D. 688 (pollution); Fleet *v.* Metrop. Asylum, 2 Times L. R. 351, 1 Times L. R. 80 (small-pox hospital); Robinson *v.* Kilvert, 41 Ch. Div. 88 (heat in cellar); Harrison *v.* Southwark Co., [1891] 2 Ch. 409 (noise); Atty.-Gen. *v.* Guildford, 12 Times L. R. 54 (small-pox hospital); Harrop *v.* Mayor, 14 Times L. R. 308 (small-pox hospital); Atty.-Gen. *v.* Mayor, 20 Times L. R. 257 (small-pox hospital); Ray *v.* Lynes, 10 Ala. 64 (blacksmith shop); Kingsbury *v.* Flowers, 65 Ala. 479 (private burying-ground); Rouse *v.* Martin, 75 Ala. 511 (steam gin-house); Fisher *v.* Feige, 137 Cal. 39 (pollution and diversion of water); Harlan Co. *v.* Paschall, 5 Del. Ch. 435 (obstruction of navigation); Garnett *v.* Jacksonville Co., 20 Fla. 889 (surface railway); Burrus *v.* Columbus, 105 Ga. 42 (surface railway); Austin *v.* Augusta Co., 108 Ga. 671 (steam railroad); Hotz *v.* Hoyt, 135 Ill. 388 (flooding); Robb *v.* La Grange, 158 Ill. 21 (pollution); Flood *v.* Consumers Co., 105 Ill. Ap. 559 (noxious odors); Bowen *v.* Manzy, 117 Ind. 258 (blacksmith shop); Dalton *v.* Cleveland, 144 Ind. 121 (erection of building); Windfall Co. *v.*

Patterson, 148 Ind. 414 (gas well); Valparaiso *v.* Hagen, 153 Ind. 337 (pollution); Miller *v.* Webster City, 94 Iowa, 162 (effluvia); Ridley *v.* Greiner, 117 Iowa, 679 (liquor selling); James *v.* Bondurant, (Iowa, 1901) 86 N. W. R. 274; Lapere *v.* Luehey, 23 Kan. 534 (spite fence); Triplett *v.* Jackson, 5 Kan. Ap. 534 (spite fence); Lexington Co. *v.* Applegate, 8 Dana, 289 (steam railroad); Dumesnil *v.* Dupont, 18 B. Mon. 800 (powder house); Louisville Co. *v.* Warren, 78 Ky. 401 (smoke); Pfingst *v.* Senn, 94 Ky. 556 (beer garden); Neaf *v.* Palmer, (Ky. 1898) 45 S. W. R. 506 (house of ill-fame); Albany Church *v.* Wilborn, 23 Ky. L. Rep. 1820, 66 S. W. R. 285, s. c. (stable); Marss *v.* Fiddler, (Ky. 1902) 69 S. W. R. 953 (blacksmith shop); Alexander *v.* Tebean, (Ky. 1903) 71 S. W. R. 427 (baseball park); King *v.* Hamill, (Md. 1903) 54 Atl. R. 625 (stable); White *v.* Kenney, 157 Mass. 12 (stable); Downing *v.* Elliott, 182 Mass. 28 (smoke); Gilbert *v.* Showerman, 23 Mich. 448 (noise); Cobb *v.* Slimmer, 45 Mich. 176 (diversion); Buchanan *v.* Grand Co., 48 Mich. 364 (diversion); Potter *v.* Saginaw Co., 83 Mich. 285 (electric railway); Ladd *v.* Fleming, 90 Mich. 181 (spite fence); Green *v.* Lake, 54 Miss. 540 (flouring mill); McCutchen *v.* Blanton, 59 Miss. 116 (noxious grass); Nagel *v.* Lindell Co., 167 Mo. 89 (surface railway); Lester Co. *v.* St. Louis, 169 Mo. 227 (obstruction of navigation); Braasch *v.* Cemetery Assn., (Neb. 1903) 95 N. W. R. 646 (burying-ground); Dunn *v.* Thomas, (Neb. 1903) 96 N. W. R. 142 (diversion); Fancher *v.* Trudel, (N. H. 1902) 52 Atl. R. 443 (blacksmith shop); Butler *v.* Rogers, 9 N. J. Eq. 487 (blacksmith shop); Wolcott *v.* Melick, 11 N. J. Eq. 204 (gases, smoke); Morgan *v.* Binghamton, 102 N. Y. 500 (sewage); Townsend *v.* Bell, 167 N. Y. 462 (reversing 42 N. Y. Ap. Div. 409 — pollution); Tucker *v.* Mack Co., 61 N. Y. Ap. Div. 521 (blasting); Levy *v.* Brothers, 4 N. Y. Misc. Rep. 48 (spite fence); Friedman *v.* N. Y. Co., (N. Y. Misc. Rep. 1903) 85 N. Y. Sup. 404 (smoke and noise); Dorsey *v.* Allen, 85 N. Ca. 358 (noise, risk of fire); Vickers *v.* Durham, 132 N. Ca. 880 (sewage); Letts *v.* Kessler, 54 Oh. 73 (spite fence); Dawson *v.* Kemper, 32 Oh. W. L. Bull. 15 (spite fence); Union Co. *v.* Lichty, 42 Oreg. 563 (flooding); Rhodes *v.* Dunbar, 57 Pa. 274 (planing mill); Dilworth's Ap., 91 Pa. 247 (explosives); McCaffrey's Ap., 105 Pa. 253 (noise and vibration); Hey *v.* Springfield Co., (Pa. 1903) 56 Atl. R. 265 (abstraction of water); Hough *v.* Doylestown, 4 Brewst. 333 (diversion of water); O'Reilly *v.* Perkins, 22 R. I. 364 (brewery); Lytton *v.* Steward, 2 Tenn. Ch. 586 (sewage); Dunn *v.* Austin, 77 Tex. 139 (cemetery); Curtis *v.* Winslow, 38 Vt. 690 (barn); Miller *v.* Black Co., 99 Va. 747 (draining away sub-surface waters); Chambers *v.* Cramer, 49 W. Va. 395 (blacksmith shop); Maxwell *v.* Central Co., 51 W. Va. 121 (telephone poles); Pope *v.* Bridgewater Co., 52 W. Va. 252 (oil well — risk of fire); Hobart *v.* Milwaukee Co., 27 Wis. 194 (street railway); State *v.* Eau Claire, 40 Wis. 533 (obstruction of navigation); McCann *v.* Strang, 97 Wis. 551 (noise). — Ed.

THE ATTORNEY-GENERAL *v.* RICHARDS.

In the Exchequer, Trinity Term, 1795.

[2 *Anstruther*, 603.]

This information stated, that, by the royal prerogative, the sea and seacoasts, as far as the sea flows and reflows between the high and low water-marks, and all the ports and havens of the kingdom, belong to his Majesty, and ought to be preserved for the use of his Majesty's vessels and others, and that his Majesty has the right of superintendency over them, for their preservation.

It then stated that the defendants in 1784 erected a wharf or key, two docks, and other buildings, between high and low water-mark, in Portsmouth Harbor, adjoining to Gosport, so as both to prevent the boats and vessels from sailing over that spot or mooring there; and also to endanger further damage to the harbor, by preventing the free current of the water to carry off the mud. The information therefore prayed that the defendants might be restrained from making any further erections, that those made might be abated, and the harbor restored to its ancient situation.

The defendants claimed to hold the soil of the place in question under letters-patent, 14th July, 4 Ch. I.

It was proved that the embankment was highly prejudicial and dangerous to the harbor, and that it was peculiarly hurtful to the town of Gosport, by preventing boats from coming immediately up to the town on that side as formerly.

This case was argued during the term by the *Attorney-General* and *Solicitor-General*, *Alexander*, *Campbell*, and *Percival* for the Crown. The *prima facie* right of the Crown to all ports and arms of the sea, and to the soil thereof, is clearly established. The nature of that right is explained by Lord Hale in his treatises De Jure Maris and De Portibus Maris.[1] It is there shown (p. 12) that the king has the soil of the seacoast and havens, and is entitled to the profits thereof as a *jus privatum;* and so far as it is considered in that light merely, he may grant it away. But he has also (pp. 81, 83, 88, 89) another right in the arms of the sea, the right of a free passage for all his subjects, and others, and of having all havens and branches of the sea preserved from nuisances for that purpose. This is a right similar to the king's property in highways, a mere *jus publicum* vested in the king for the use of the subjects. This, by its nature, is unalienable, and shall prevail against any claim set up against it. Lord Hale, De Jure Maris, 12; De Jure Portibus, 85.

Where any invasion of the *jus privatum* of the Crown, in arms of the sea or ports, takes place by encroachment on the soil, it is a purpresture. Glanville, l. 9, c. 11; Spelm. Gloss. Purpresture. Where

[1] See Mr. Hargrave's Law Tracts.

the *jus publicum* is violated, it is a nuisance; and it frequently happens, as in the present case, that a nuisance in a port is accompanied with a purpresture, or encroachment on the soil of the Crown.

All nuisances may be abated by the mere act of any individual; but, in the case of the Crown, the more proper and decorous mode of proceeding is by information in a court of justice for ascertaining the right. This may be done by information in equity as well as at law; and the nuisance may be decreed to be abated.

In the case of a purpresture, the same mode of proceeding has been held proper. In case of a decree for the Crown, an inquiry is directed whether it be most beneficial for the Crown to abate the purpresture, or to suffer the erections to remain and be arrented. Where the purpresture is also a nuisance, the Crown has not this election; for it cannot sanction a nuisance.

In the case of the Attorney-General *v.* Philpot, in this court,[1] the information stated the Crown to be seised of the river Thames where navigable and an arm of the sea for the use of the ships resorting there; and that the Crown was also seised of the soil between high and low water-mark; that the defendants had lately encroached upon the soil of the king, and had thereby stopped the course of the river, and rendered it less convenient for shipping and for their mooring in the pool. The information therefore prayed that the encroachment might be declared a purpresture, and be abated as such. The defendants set up a defence that they had had the leave of the High Admiral, and that their encroachment was no damage to the shipping. The court declared that purprestures on navigable rivers ought to be abated. They accordingly directed a commission to inquire whether the fact complained of was a purpresture. The commissioners returned that it was, and the encroachment was abated.

So in the case of City of Bristol *v.* Morgan, cited in Lord Hale's treatise De Portibus Maris, p. 81. The bill stated the benefit of navigable rivers for commerce, and the right to have all purprestures therein abated. It was proved that the defendants had erected houses on the banks of the Avon, so as to streighten the river, and to incommode the passage to and from the shipping to the shore: that these houses also intercepted the commerce to the town, and tended to defraud the revenue. The encroachments were ordered to be abated, on the ground of the damage to the city; but were never destroyed, some composition having probably been entered into. A similar case is there cited to have been determined between the Town of Newcastle and Johnson relative to the right of towage on the river Tyne.

In Churchman *v.* Tunstal,[2] the plaintiff sued by bill as tenant of an ancient ferry under the Crown, to suppress a new ferry set up in the neighborhood, to the damage of his ancient ferry, and to obtain an injunction against renewing it. The court there dismissed the bill, as seeking to establish a monopoly; but another bill being afterwards

[1] 8 Ch. I. [2] Hardr. 162.

filed for the same matter, the court on 7th April, 14 Ch. II. (Lord Hale presiding in it), decreed that the new ferry should be suppressed, and that the defendants should not have liberty to use any ferry-boat to the annoyance of the plaintiff's ancient ferry.[1]

So in the anonymous case, 3 Atk. 750, where it was moved to issue an injunction against building a small-pox hospital in Cold Bath Fields, Lord Hardwicke lays it down that, in the case of a public nuisance, an information by the attorney-general is the proper remedy. He was then sitting in equity, and must be understood to mean an information in a court of equity. Besides, he refused the injunction in that case upon the want of merits, not from any doubt of his jurisdiction.

MACDONALD, Chief Baron, this day delivered the opinion of the court (after stating the case), to this effect.

It is clear that the right to the soil between high and low water-mark is *prima facie* in the Crown. Then the *onus* of proving an adverse title is thrown upon the defendants.

But it is argued that the prayer of the bill being to abate the erections as a nuisance, the court can only consider that question, as alone supporting the relief prayed; and it is contended that this court cannot give such a decree, or at least not without the intervention of a jury, the question of nuisance being, as laid down by Lord Hale, a question of fact and not of law. That may be, where the question is of nuisance only, and the evidence doubtful. But the cases cited, and those which Lord Hale has given us, in the treatise De Portibus Maris, clearly prove that where the king claims and proves a right to the soil where a purpresture and nuisance have been committed, he may have a decree to abate it. The case of the river Thames and the Bristol and the Newcastle cases, cited by Lord Hale, are all authorities for this proposition. The case in Hardr. 162 was at first determined otherwise; but the reporter doubts its authority, as it was afterwards overturned. It is objected that these cases were in the time of Ch. I.; but it must be remembered that Lord Hale determined some of them, and approved the rest. Supported by such authority, we do not hesitate to declare that the soil is the property of the Crown; and of course, to decree, that these buildings be abated.[2]

1 See the Minute Book, 1662, p. 181.

2 Atty.-Gen. *v.* Cohoes Co., 6 Paige, 133; People *v.* Vanderbilt, 26 N. Y. 396 *Accord.*

Obstruction of highway or navigation. — Injunctions were granted in the following cases at the suit of the state to restrain the creation or continuance of the public nuisance of obstruction of the highway or navigation. Atty.-Gen. *v.* Forbes, Mitf. Pl. (5th ed.) 145 n. (e); Atty.-Gen. *v.* Forbes, 2 My. & Cr. 123; Atty.-Gen. *v.* Johnson, 2 Wils. C. C. 87; Atty.-Gen. *v.* Berridge, 10 Price, 350; Atty.-Gen. *v.* Parmeter, 10 Price, 378, 412; Atty.-Gen. *v.* Oxford Co., 2 W. R. 330, 331 (*semble*); Atty.-Gen. *v.* Gr. North Co., 1 Dr. & Sm. 154, 161 (*semble*); Atty.-Gen. *v.* United Co., 30 Beav. 287 (*semble*); Atty.-Gen. *v.* Lonsdale, 7 Eq. 377; Atty.-Gen. *v.* Terry, 9 Ch. 423; Atty.-Gen. *v.* Scott, [1904] 1 K. B. 404; *Re* Debs, 158 U. S. 564 (stopping the mails); Ala. *v.* Mayor, 5 Port. 279; Hoole *v.* Atty.-Gen., 22 Ala. 190; People *v.* Davidson, 30 Cal. 379 (*semble*); Craig *v.* People, 47 Ill. 487; Smith *v.* McDowell, 148 Ill. 51; Atty.-Gen. *v.* Cambridge, 16 Gray, 247; District Atty. *v.* Lynn Co., 16 Gray, 242 (*semble*); Atty.-Gen. *v.* Tudor Co., 104 Mass. 239, 244 (*semble*); Atty.-Gen. *v.* Woods, 108 Mass. 436; Atty.-Gen. *v.* Metrop. Co., 125 Mass. 515, 516 (*semble*); Atty.-Gen. *v.* Tarr, 148 Mass. 309;

State *v.* Saline Ct., 51 Mo. 350, 381 (*semble*); State *v.* Uhrig, 14 Mo. Ap. 413, 414; State *v.* Sanders, 66 N. H. 39, 81 (*semble*); Atty.-Gen. *v.* N. J. Co., 3 N. J. Eq. 136, 139 (*semble*); Atty.-Gen. *v.* Heisbon, 18 N. J. Eq. 410, 413 (*semble*); Atty.-Gen. *v.* Brown, 24 N. J. Eq. 89, 91 (*semble*); People *v.* Equity Co., 141 N. Y. 232 (*semble* — if public safety or convenience requires); Commw. *v.* Rush, 14 Pa. 186; Commw. *v.* Stevens, 178 Pa. 543; State *v.* R. R. Co., 36 Oh. St. 434; State *v.* Carpenter, 60 Wis. 165 (*semble*); State *v.* Milwaukee, 102 Wis. 509, 512 (*semble*).

Injunction against public nuisance at the suit of a city or town. — By virtue of the delegated authority, express or implied of the state, a suit to restrain a public nuisance may be maintained by a city or town, or by a special department of the municipality. Mayor *v.* Bolt, 5 Ves. 129; Nuneaton Board *v.* Sewage Co., 20 Eq. 127; Demopolis *v.* Webb, 87 Ala. 659; San Francisco *v.* Buckman, 111 Cal. 25; Cloverdale *v.* Smith, 128 Cal. 230; Burlington *v.* Schwarzman, 52 Conn. 181; Chicago Co. *v.* Quincy, 136 Ill. 489; Cheek *v.* Aurora, 92 Ind. 107; Drew *v.* Geneva, 150 Ind. 662; Waterloo *v.* Union Co., 72 Iowa, 437; Mercer Co. *v.* Harrodsburg, 23 Ky. L. Rep. 1744, 66 S. W. R. 10, s. c.; Winthrop *v.* Farrar, 11 All. 398; Watertown *v.* Mayo, 109 Mass. 315; Taunton *v.* Taylor, 116 Mass. 254, 262; Board *v.* Detroit, 117 Mich. 450 (suit by Board); Stearns *v.* St. Cloud Co., 36 Minn. 425 (suit by county); Pike City *v.* Munch, 42 Minn. 342; Hutchinson *v.* Filk, 44 Minn. 536; Buffalo *v.* Harling, 50 Minn. 551; Albert Lee *v.* Knatwold, (Minn. 1903) 95 N. W. R. 309; Greenwich *v.* E. Co., 24 N. J. Eq. 217, 25 N. J. Eq. 565; Newark *v.* Delaware Co., 42 N. J. Eq. 196; Rankin *v.* Port Co., 49 N. J. Eq. 11; Coast Co. *v.* Mayor, 56 N. J. Eq. 615; Watertown *v.* Cowen, 4 Paige, 510; Rochester *v.* Erickson, 46 Barb. 92; Common *v.* Long, 1 Pars. Eq. 143; New Castle *v.* Raney, 130 Pa. 546 (*semble*); Pittsburg *v.* Epping Co., 194 Pa. 318; Hurn *v.* Volga, 8 S. Dak. 443; Pence *v.* Bryant, (W. Va. 1903) 46 S. E. R. 275; Sheboygan *v.* Sheboygan Co., 21 Wis. 667 (*semble*); Eau Claire *v.* Matske, 86 Wis. 121; Pewaukee *v.* Savoy, 103 Wis. 271; Wauwatosa *v.* Dreutzer, 116 Wis. 117.

Injunctions against public nuisances at the suit of individuals. — In some jurisdictions, by legislation, a limited number of citizens, or even a single citizen, may maintain a suit to restrain the public nuisance of liquor-selling: Kansas *v.* Ziebold, 123 U. S. 623, 670 (*semble*); Legg *v.* Anderson, 116 Ga. 401; Littleton *v.* Fritz, *supra*, 31; Dickinson *v.* Eichhorn, 78 Iowa, 211; Abrams *v.* Sandholm, (Iowa, 1893) 93 N. W. R. 563; Davis *v.* Auld, 96 Me. 558; Carleton *v.* Rugg, 149 Mass. 550; State *v.* Bradley, 10 N. Dak. 157.

Nuisances alike public and private. — If a public nuisance causes a "special grief" to a private citizen, so that it is a tort as well as a crime, equity will restrain the wrong-doer as well upon a bill filed by the private citizen, as upon an information brought by the attorney-general. Spencer *v.* London Co., 8 Sim. 189; Sampson *v.* Smith, 8 Sim. 272; Cook *v.* Mayor, 6 Eq. 177; Pa. Co. *v.* Whiting, 13 How. 518; Atty.-Gen. *v.* Brighton Association, [1900] 1 Ch. 276; Frink *v.* Lawrence, 20 Conn. 117; Wheeler *v.* Bedford, 54 Conn. 244; Nolan *v.* New Britain, 69 Conn. 668; Young *v.* Rothrock, (Iowa, 1903) 96 N. W. R. 1105; Fessler *v.* Union, (N. J. Eq. 1903) 56 Atl. R. 272; Fanning *v.* Osborne, 102 N. Y. 441; Flynn *v.* Taylor, 127 N. Y. 596; Wakeman *v.* Wilbur, 147 N. Y. 657; Ackerman *v.* True, 175 N. Y. 353; Hallock *v.* Scheyer, 33 Hun, 111; Beekman *v.* Third Av. Co., 13 N. Y. Ap. Div. 279; Gorton *v.* Tiffany, 14 R. I. 95; Pence *v.* Bryant, (W. Va. 1903) 46 S. E. R. 275.

If, however, a nuisance is not a tort to a particular individual, as well as a crime against the state, equity will not grant an injunction at the suit of a private citizen (except in cases like those cited in the fourth paragraph of this note, in which by express legislation a citizen is allowed to act in behalf of the state). Georgetown *v.* Alexandria Co., 12 Pet. 91; Irwin *v.* Dixie, 9 How. 10; Siskiyou Co. *v.* Rostel, 121 Cal. 511; Spring Works *v.* Fifield, 136 Cal. 14; Bigelow *v.* Hartford Co., 14 Conn. 565; O'Brien *v.* Norwich, 17 Conn. 372; Harlan *v.* Paschall, 5 Del. Ch. 435; Coast Co. *v.* Cohen, 50 Ga. 451; Guttery *v.* Glenn, 201 Ill. 275; McCowan *v.* Whitesides, 31 Ind. 235; Decker *v.* Evansville Co., 133 Ind. 493; Beckham *v.* Brown, 19 Ky. L. Rep. 519, 40 S. W. R. 684, s. c.; Brainerd *v.* Conn. Co., 7 Cush. 506; Hartshorn *v.* So. Reading, 3 All. 501; Baker *v.* McDaniel, (Mo. 1903) 77 S. W. R. 531; Humphreys *v.* Eastlack, 63 N. J. Eq. 136; Adler *v.* Metrop. Co., 138 N. Y. 797; Ryburn *v.* Sawyer, 128 N. Ca. 8; Rhymer *v.* Fritz, (Pa. 1903) 55 Atl. R. 959; Manson *v.* South Co., 64 S. Ca. 120; Wees *v.* Coal Co., (W. Va. 1903) 46 S. E. R. 166. — Ed.

ATTORNEY-GENERAL *v.* H. B. WILLIAMS AND OTHERS.

SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER 30, 1899.

[174 *Massachusetts Reports*, 476.]

KNOWLTON, J.[1] This is an information by the Attorney-General to prevent the erection and maintenance of that portion of a building on Copley Square, in the city of Boston, which is above the limit of height prescribed by St. 1898, c. 452. Section 1 of this statute is as follows: "Any building now being built or hereafter to be built, rebuilt, or altered in the city of Boston upon any land abutting on St. James Avenue between Clarendon Street and Dartmouth Street, or upon land at the corner of Dartmouth Street and Huntington Avenue, now occupied by the Pierce building, so called, or upon land abutting on Dartmouth Street now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth Street and Boylston Street now occupied by the New Old South Church building, may be completed, built, rebuilt, or altered to the height of ninety feet and no more; and upon any land or lands abutting on Boylston Street between Dartmouth Street and Clarendon Street may be completed, built, rebuilt, or altered to the height of one hundred feet and no more; provided, however, that there may be erected on any such building above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments, and chimneys as the board of park commissioners of said city may approve." Section 2 repeals St. 1896, c. 313, and St. 1897, c. 379, so far as they limit the height of buildings erected along the line of streets, parkways, or boulevards bordering on public parks. Section 3 provides for the payment of damages to any person owning or having an interest in an uncompleted building begun before the fourteenth day of January, 1898, which is affected by the act, and section 4 provides for compensation to all persons sustaining damages to their property by reason of the limitation of the height of buildings prescribed by the act. The case is reported upon the information, demurrer, pleas, and certain facts found at the hearing on the pleas.

It is contended by the defendants that the Attorney-General cannot maintain a suit in equity to enforce this statute. His right depends upon the construction put upon the statute. We hold that the statute gives rights in the nature of an easement over lands facing Copley Square, which easement is annexed to the square for the benefit of the public, for whose use and enjoyment Copley Square was laid out; and that these rights are similar in their nature to rights in highways, in great ponds, and in the navigable waters of the Commonwealth. For a deprivation of such public rights, an individual, unless he has suffered damages different in kind from those to the public generally,

[1] Only so much of the opinion is given as relates to the question of equity jurisdiction. The court decided that St. 1898, c. 452, was constitutional. — ED.

cannot maintain an action. The Attorney-General, as a public officer, represents the public, and may bring all proper suits to protect their rights. The wrong alleged in the present case, if permitted, would work a permanent injury to the public, depriving them of that which the statute gives them. It is a purpresture which, while not in a strict and narrow sense a public nuisance, is in the nature of a public nuisance, is sometimes called a public nuisance, and in equity is to be dealt with as a public nuisance. Commonwealth *v.* Wilkinson ;[1] Attorney-General *v.* Boston Wharf Co. ;[2] Attorney-General *v.* Woods ;[3] Jenks *v.* Williams ;[4] Attorney-General *v.* Old Colony Railroad ;[5] People *v.* Vanderbilt.[6] In regard to the enforcement of rights given to the public and to other land-owners in lands reserved for their use by the Commonwealth, see Attorney-General *v.* Gardiner ;[7] Attorney-General *v.* Williams ;[8] Attorney-General *v.* Algonquin Club.[9] In England it is held that "the Attorney-General has a right to represent the public, either in equity or by prosecution at law, in cases where the public interests are exposed to danger or mischief." Attorney-General *v.* Birmingham & Oxford Junction Railway ;[10] Attorney-General *v.* Mid-Kent Railway ;[11] Attorney-General *v.* Shrewsbury Bridge Co. ;[12] Attorney-General *v.* Cockermouth Local Board.[13] In Attorney-General *v.* Jamaica Pond Aqueduct,[14] it was said in reference to a great pond that, where an aqueduct corporation proceeds to draw off water to such an extent "as to injure or endanger the rights of the public therein, an information in equity would furnish the only adequate means of asserting and protecting the rights of the government and of the public." The case of Attorney-General *v.* Abbott,[15] under facts very similar to those of the present case, sustains the right of the Attorney-General to maintain an information in equity for the protection of public rights in land dedicated to the use of the public as a park. Of similar purport is Attorney-General *v.* Tarr.[16] His right in Attorney-General *v.* Revere Copper Co.,[17] a similar case, was assumed. See also Attorney General *v.* Metropolitan Railroad ;[18] Attorney-General *v.* Consumers' Gas Co.[19] We are of opinion that the Attorney-General is the proper party, and that an information in equity is the proper form of proceeding for the enforcement of public rights against encroachments like those threatened in the present case.

In the opinion of a majority of the court the entry must be,

Demurrer and pleas overruled.[20]

1 16 Pick. 175.
2 12 Gray, 553.
3 108 Mass. 436.
4 115 Mass. 217.
5 160 Mass. 62.
6 26 N. Y. 287.
7 117 Mass. 492, 499.
8 140 Mass. 329, 330, 331.
9 153 Mass. 447, 454.
10 3 Macn. & G. 453.
11 L. R. 3 Ch. 100.
12 21 Ch. D. 752.
13 L. R. 18 Eq. 172.
14 133 Mass. 361, 364.
15 154 Mass. 323.
16 148 Mass. 309, 314.
17 152 Mass. 444.
18 125 Mass. 515.
19 142 Mass. 417.
20 Att'y-Gen. *v.* Abbott, 154 Mass. 323 *Accord.* — Ed.

ATTORNEY-GENERAL UPON THE RELATION OF SUNDRY CITIZENS OF RALEIGH *v.* THEOPHILUS HUNTER.

SUPREME COURT, NORTH CAROLINA, DECEMBER, 1826.

[1 *Devereux, Equity*, 12.]

THE bill charged that the defendant had erected a mill-dam in the vicinity of the city of Raleigh, that the exhalations from the pond had rendered the inhabitants unhealthy, and prayed a perpetual injunction.

The defendant, by his answer, denied that his mill-pond had any pernicious influence upon the health of the town, and averred that he had been indicted in Wake County Court for a nuisance in erecting the dam, and that the jury, upon an attempt to try the indictment, had disagreed, and had refused to find a verdict for the state. That subsequently a *nolle prosequi* had been entered by the prosecuting officer. That the defendant had again been indicted in the Superior Court, that a trial had been delayed by the state, the Attorney-General entering a *nolle prosequi* and ordering new process, and that this last indictment was still pending.

Much testimony was taken and read at the hearing, which it is not necessary to recapitulate, as the court thought that the allegations of the bill were fully sustained.

The case was argued at June Term, 1826, by *Gaston* for the plaintiffs, and *Badger* for the defendant; no note of which argument is in the hands of the present reporters. At that Term the final decree was settled, but from some oversight it was not entered or the cause reported.

The opinion of the court was delivered by

HENDERSON, J. We are satisfied beyond a reasonable doubt, that the flowing back of the water as contemplated by the defendant, according to his own admissions will create a public nuisance, and that of the worst kind, being one destructive to the health and comfort of the citizens of Raleigh. And we are called on to send the question of nuisance or no nuisance to a court of law; for what — to inform our consciences? they are already informed. And were a jury to find that it was not a nuisance, in a case of this kind, we should feel ourselves bound to disregard their verdict; for a jury would require the most satisfactory evidence of the fact, at least they would require a preponderance of evidence to convict; with us, under all the circumstances of the case, a *probability* is sufficient. In the first place, the injury is irreparable, the place, the seat of government, where its officers are compelled to reside. These things make a difference between this case and that of a common nuisance. It is true it is a question of the most delicate kind, an interference with private rights from which all departments of government should abstain except in cases of necessity. It is, however, a sound political maxim, and one sanctioned

by the courts of justice of this country, that individual interest must yield to that of the many; and this is something like the interest of the many, for every individual is in some way or other interested in the welfare of the capital. We refer to the decision of Bell and Blount,[1] as an authority to show the jurisdiction of the court. Where the right infringed is of a doubtful character, as the right of view over another's ground, there a court of equity will order the right to be established at law before it will grant an injunction, in the mean time staying the owner of the land from closing up the view; but here the rights infringed upon are of a character not in the least doubtful, the health and comfort of the relators and others for whom they act.

Injunction perpetuated.[2]

ATTORNEY-GENERAL *v.* FITZSIMMONS AND OTHERS.

PULASKI COUNTY COURT, ARKANSAS, 1896.

[35 *American Law Register*, 100.]

THE bill prayed for an injunction to restrain the Corbett-Fitzsimmons prize-fight. The defendants demurred to the bill on the ground that equity had no jurisdiction to entertain such a suit.

MARTIN, C.[3] Under the act of 1885 and secs. 2380 of S. & H. Dig., I believe it is conceded that this court might have put Corbett and Fitzsimmons under bonds to keep the peace, in sums not exceeding $5000; and from this it is argued that no jurisdiction exists to do more.

The bill alleges, and the demurrer confesses, that a bond of $5000, the maximum bond which, under the statute, could be required, would not prevent the fight, and would not prevent the other acts complained of in the bill, among them the public nuisance, which is minutely described. It follows, then, as certainly as night the day, that unless the Chancellor could apply some other remedy than that

[1] 4 Hawks, 384.

[2] The right to maintain an injunction to restrain a public nuisance affecting the health of the community is almost everywhere recognized. Anon. 3 Atk. 750, 751, Amb. 158, s. c. (*semble*); Att'y-Gen. *v.* Cleaver, 18 Ves. 211 (*semble* — interlocutory injunction denied); Att'y-Gen. *v.* Luton Board, 2 Jur. N. S. 180; Att'y-Gen. *v.* Birmingham, 4 K. & J. 528; Att'y-Gen. *v.* Charles, 11 W. R. 253 (*semble* — interlocutory injunction denied); Att'y-Gen. *v.* Kingston, 34 L. J. Ch. 481 (*semble*); Att'y-Gen. *v.* Basingstoke, 45 L. J. Ch. 726; Att'y-Gen. *v.* Manchester, [1893] 2 Ch. 87 (*semble* — interlocutory injunction denied); Att'y-Gen. *v.* Tod Heatley, [1897] 1 Ch. 560 (mandatory injunction); Att'y-Gen. *v.* Mayor, 20 T. L. R. 257 (*semble* — insufficient evidence of impending danger); Mugler *v.* Kansas, 123 U. S. 623, 673; Missouri *v.* Illinois, 180 U. S. 208; Kansas *v.* Colorado, 185 U. S. 125; Att'y-Gen. *v.* Jamaica Corporation, 133 Mass. 361; Pine City *v.* Munch, 42 Minn. 342; State *v.* Uhrig, 14 Mo. Ap. 413, 414 (*semble*); Att'y-Gen. *v.* Heishon, 18 N. J. Eq. 410, 413 (*semble*); Att'y-Gen. *v.* Steward, 20 N. J. Eq. 415, 21 N. J. Eq. 340; Att'y-Gen. *v.* Paterson, 58 N. J. Eq. 1; Att'y-Gen. *v.* Blount, 4 Hawks, 384.

In Wisconsin the Supreme Court has no original jurisdiction to restrain a public nuisance affecting the health of the community. *Re* Hartung, 98 Wis. 140. — ED.

[3] Portions of the opinion of the court are omitted. — ED.

of a mere bond to keep the peace, limited as it is to the sum of $5000, that the power conferred, and the duty enjoined upon him, would fall far short of enabling him to adequately maintain the good order of the state government, whose peace he is to conserve.

Courts of equity will not, generally, interfere by injunction to prevent the commission of ordinary crimes, and this is upon the principle that an adequate remedy exists at law. But what have we here as shown by the complaint and confessed by the demurrer? A comparatively small part of the state in league with a few prize-fighters and their trainers, bonded together in a collusive determination to openly violate the statutes of the state, flinging defiance in its face, and saying to the constituted authorities of the state government: "We will be protected by local authorities, and you are powerless to vindicate the majesty of your laws, to preserve the good name of the state, to uphold its institutions, or to conserve its peace."

The governor has run the gamut of executive functions to find legal power or authority, lodged in him as the chief executive, to lay hold of the threatened infraction of the statutes, and by reason of the restrictive constitutional limitations upon his power, he could legally do nothing without the aid of some court, to accomplish a proper conservation of the peace in that part of Arkansas' domain. The attorney-general says in the bill of complaint, "That in open defiance of the laws of the state, of its peace and good order, of its good name and general welfare, all the defendants herein, and many others whose names are to the plaintiff unknown, undertook such measures as were deemed necessary by them to bring about said fight in said Garland County, in or near said city of Hot Springs. They advertised the fact throughout the entire country that the fight would occur for the championship of the world, and in every way and by all means sought to induce persons to come from all over the land to witness the fight, and openly stated that the attendance would be some fifty thousand people; that accommodations would be made to seat that number to view the fight."

He also avers in the bill "that if said fight occurs, it will seriously endanger the lives of the participants, who are gifted with extraordinary strength and skill, fight for a very large stake, as well as for the championship of the world, and entertain feelings of intense hostility towards each other. That it will bring together from all parts of the country a lawless, violent, turbulent, and dangerous assemblage of many thousands of persons, and will cause riots and affrays, seriously endangering the safety of many others, to the prejudice of the good name and general welfare of the state. That the assemblage and fight contemplated would constitute a public nuisance, which would endanger not only the lives of persons not engaged or participating in it, but property generally."

We need not resort to any consideration of a public necessity to maintain the laws and dignity of the state, nor to that principle of equity jurisprudence that courts of chancery will intervene to pre-

vent a multiplicity of suits, to sustain the jurisdiction of the court over the subject-matter of this action. While conceding that courts of equity have no power to enforce the criminal statutes of the state, and no jurisdiction to enjoin the commission of crimes ordinarily, yet where the crime arises from, or is a constituent part of a public nuisance, they should not fail to exercise their extraordinary powers to abate the nuisance; and in doing this, they may, by proper orders, prevent the commission of the crime. Vice-Chancellor Shadwell so thought when he delivered his opinion in Attorney-General *v.* R. Co.[1]

The case of Columbia Athletic Club *v.* State[2] was one instituted to enjoin an athletic association from "pulling off" an industriously advertised prize-fight, and to put the property of the association in the hands of a receiver. The chief justice, who delivered the opinion of the court, affirmed the judgment of the lower court in making the injunction perpetual, and, going a step farther than I have gone in this case, by appointing a receiver to take charge of the club house and grounds of the association, in order to prevent the fighting of the pugilists, says: "It would be monstrous to adjudge that, because acts constituting the abuse of corporate privileges are crimes, therefore the corporation may persist in doing them. This would be to encourage corporations to perpetuate the gravest abuses, since, under such a rule, the graver the abuse the less the power of the civil branch of our law. It comes with an ill grace from a corporation to aver that, because the abuse of its corporate privileges consists of committing crime, civil remedies are unavailable. It would outrage common sense unspeakably to give ear to a corporation defending itself against a civil proceeding by asserting its own infamy and insisting that redress can only be had under the laws punishing the crimes." A like conclusion was reached in Massachusetts, in the case of Carleton *v.* Rugg,[3] the language of the court being: "The fact that keeping a nuisance is a crime does not deprive a court of equity of the power to abate the nuisance." See, also, Morawetz Priv. Corp. par. 1043. . . .

Judge Brewer, *in re* Petition of Debs,[4] for the Supreme Court of the United States, says: "The jurisdiction of the court of chancery with regard to public nuisances is founded on the irreparable damage to individuals, or the great public injury which is likely to ensue. 3 Daniell's Ch. Pr. 3d ed., Perkins, 1740. Indeed it may be affirmed that in no well-considered case has the power of the court of equity to interfere by injunction in cases of public nuisance been denied, the only denial ever being that of a necessity for the exercise of that jurisdiction under the circumstances of that particular case. Story's Eq. Jur. par. 921, 923, 924; Pomeroy's Eq. Jur. par. 1349; High on Injunctions, par. 745 and 1554; 2 Daniell's Ch. Pl. and Pr. 4th ed. p. 1636."

That the complaint filed by the attorney-general in this case alleges facts which constitute a menace to the lives of citizens, with destruction of their property, the disturbance of the peace and tran-

[1] 4 DeG & S. 75. [2] 28 L. R. A. 727. [3] 149 Mass. 550. [4] 158 U. S. 564.

quillity of the community, the general welfare and reputation of the state, and a great public nuisance, calling for the exercise of all the legitimate powers of this court to abate and prevent the consummation of the threats alleged in the bill, I think, is not open to question. . . .

The most efficient, humane, and flexible remedy is that of injunction. Under this form the court can prevent that from being done which, if done, would cause a nuisance; it can command an observance of peace before it is broken; it can save suffering, and sometimes disgrace, to those who are in no way responsible; and in some instances, and I believe this case presents one of them, it can secure an obedience to the laws of the country that a court of law, pursuing the other remedy, could not do.

My conclusions are: —

(1) That jurisdiction over the persons of such of the defendants as voluntarily came into Pulaski County, and were summoned here, is given by the statute quoted in this opinion;

(2) That the complaint charges such a state of facts as constitutes a public nuisance in the eyes of the laws of this state;

(3) That the demurrer admits the material allegations of the complaint to be true;

(4) That a court of equity has ample jurisdiction to prevent, or abate by injunction, a public nuisance, in a civil action instituted by the sovereign on the relation of her attorney-general;

(5) That the power to prevent or abate the nuisance involves the jurisdiction to make all orders that may be necessary, and that of a preventative character, to effectuate orders for prevention or abatement; and this involves the jurisdiction to enjoin the commission of a crime which inheres in, or constitutes a part of the nuisance.[1]

[1] Columbian Club *v.* State, 143 Ind. 98 (compare State *v.* O'Leary, 155 Ind. 526 — no injunction against a gambling house out on the prairie); State *v.* Olympic Club, 47 La. An. 1095; State *v.* Hobart, 11 Oh. Dec. 166 *Accord.*

In Littleton *v.* Fritz, *supra*, 31, it was decided, that a statute making the selling of intoxicating liquor, except for medical, scientific, or mechanical purposes, a public nuisance, and authorizing an injunction was constitutional, and an injunction was granted accordingly. Injunctions were granted under similar conditions in the following cases: Kansas *v.* Ziebold, 123 U. S. 623; Eilenbecker *v.* Plymouth Colony, 134 U. S. 31; Legg *v.* Anderson, 116 Ga. 401; Dickinson *v.* Eichhorn, 78 Iowa, 211; State *v.* Crawford, 28 Kan. 726 (*semble*); Davis *v.* Auld, 96 Me. 559; Carleton *v.* Rugg, 149 Mass. 550; State *v.* Saunders, 66 N. H. 39; State *v.* McGruer, 9 N. Dak. 566; State *v.* Bradley, 10 N. Dak. 157; State *v.* Sioux Co., 2 S. Dak. 363; Manor Casino *v.* State, (Tex. Civ. Ap. 1896) 34 S. W. R. 769.

But see, *contra*, State *v.* Uhrig, 14 Mo. Ap. 413.

In State *v.* Ohio Co., 150 Ind. 21, an injunction was granted at the suit of the State restraining the defendant from wasting natural gas, by permitting it, in violation of the statutes of Indiana, to escape from wells drilled by the defendant upon its own land. The conduct of the defendant was treated as a public nuisance. The decision was affirmed on a writ of error to the Supreme Court of the United States. 177 U. S. 190. — Ed.

118 N. W. 255 (Pa.)

115 SW. 1130 (Ky.)

SECTION V.

Rights of Monopoly.

(*a*) *Patent Rights.*

HICKS *v.* RAINCOCK.

Before Lord Thurlow, C., July 23, 1783.

[2 *Dickens*, 647.]

Demurrer to a bill for an injunction to stay the infringement of a patent for making loops in stockings; for that the plaintiff had not established his right at law. Cases cited: Chetwynd *v.* Lyndon;[1] Salkeld *v.* Science;[2] Lord Teynham *v.* Herbert; Whitchurch *v.* Hyde.[3]

Lord Chancellor. — Overrule the demurrer.[4]

WIRT *v.* HICKS.

Circuit Court, United States, Southern District of New York, April 16, 1891.

[46 *Federal Reporter*, 71.]

Shipman, J. This is a demurrer to the complainant's bill in equity, to restrain the infringement of two letters patent for improvements in fountain pens. The complainant owns one of the patents as assignee, and the other as patentee. The bill alleges the originality and the novelty of the inventions, the grants of letters patent therefor, the sole ownership of the said letters by the complainant, and the infringements thereof by the defendants, by which they have made large profits. It further alleges that they are threatening future infringements, which will be to the complainant's injury; that by the acts of the defendants he is being and has been deprived of profits which he otherwise would have obtained; that they have been notified of the complainant's rights in the premises, and have been requested to desist from infringing thereon, but have refused to comply with said request. The bill asks for an injunction "provisionally and perpetually" against infringement, and also prays for an accounting of profits and damages.

[1] 2 Ves. 450. [2] 2 Ves. 107. [3] 2 Atk. 391.

[4] Kay *v.* Marshall, 1 My. & Cr. 373; Atwill *v.* Ferrett, 2 Blatchf. 39 (copyright); Farmer *v.* Calvert Co., 1 Flip. 228 *Accord.* — Ed.

The principal grounds of demurrer are that it does not appear from the bill that the complainant is or has been engaged in the manufacture, sale, or use of the patented inventions, or that they have been a source of profit to him, and that the bill has no allegation, which, if true, would show any substantial injury to the complainant from the acts of the defendants. The bill could not be relied upon as a foundation for a motion for preliminary injunction. It does not state a prior adjudication upon the validity of the patent, or acquiescence by the public in its use and enjoyment by the owners thereof, or any use by the complainant of his patented rights. Isaacs *v.* Cooper;[1] Sullivan *v.* Redfield;[2] Parker *v.* Brant;[3] Gutta Percha, etc. Co. *v.* Goodyear, etc. Co.;[4] Walk. Pat. § 660; 3 Rob. Pat. § 1206. But the allegations are sufficient in a bill for an injunction to be issued at the conclusion of the suit when the validity of the patent has been established by the proofs in the case. It is not necessary to aver or to show the extent of the complainant's damages, and the bill has alleged, as it properly should allege, if an accounting is prayed for, that the defendants have made profits. Walk. Pat. § 579. The mere power of the court, under the statute, to issue an injunction to prevent a defendant from infringing upon a right secured by letters patent, does not depend upon the magnitude of the injury which the plaintiff has suffered. Colgate *v.* Telegraph Co.[5] In the exercise of the power the equities of the respective parties and the amount of the injury to be remedied or inflicted are weighed by the court.

The demurrer is overruled, with costs, and the defendants will answer over in thirty days.[6]

STEVENS *v.* KEATING.

Before Lord Cottenham, C., January 22, 1847.

[2 *Phillips*, 333.]

The object of this suit was to restrain an alleged infringement of a patent granted to the plaintiff in 1835, for a particular process in the manufacture of cement. A motion having been made for an injunction before the Vice-Chancellor of England, his Honor granted it, at the same time ordering that the plaintiff should forthwith bring an action. On appeal from that order the Lord Chancellor upheld the injunction, on the ground of the length of undisturbed enjoyment under the patent. And in the course of his judgment, adverting to an observation which had been made by counsel in the argument, that some late decisions of his Lordship were supposed to have narrowed

[1] 4 Wash. C. C. 259. [2] 1 Paine, 452. [3] 1 Fish. Pat. Cas. 58.
[4] 3 Sawy. 442. [5] 17 Blatchf. 308.
[6] McCoy *v.* Nelson, 121 U. S. 484; Wyckoff *v.* Wagner Co., 88 Fed. 515 *Accord.* Germain *v.* Wilgus, 67 Fed. 597 *Contra.* — Ed.

the jurisdiction formerly exercised by the court in patent cases, particularly in those in which the patent was of several years' standing, his Lordship made the following remarks: —

The Lord Chancellor. Before I advert to the particular provisions of the specification I wish to make an observation in reference to what I have been informed of from the bar, but of which I was not aware before, namely, that an impression exists that I have expressed some opinion adverse to the principles and doctrines laid down by Lord Loughborough, Lord Eldon, and every succeeding chancellor, including myself, who have exercised jurisdiction in these matters; and for that purpose I was anxious to find out what cases there were on which that impression was founded. None were cited on either side to justify such an impression, but I have looked into a book that seems very accurately to collect the cases, I mean Mr. Hindmarsh's work on Patents, and there I find all the cases on the subject arranged in regular order, the two last of which were decided by myself — Collard *v.* Allison, reported also in 4 Mylne & Craig, and Neilson *v.* Thompson — in both of which the doctrine of former judges is distinctly recognized. I have no recollection of having ever used an expression calculated to raise the impression which I am told at the bar exists, and I am anxious to state that if I have it was quite inadvertently, and that no intention ever existed, or now exists in my mind, to do that which I am told it is supposed I had done. I have no reason to question the soundness of that doctrine, and if I had, I am not so rash as to take on myself to overturn a system that has existed for a century, and which has been the recognized doctrine of the most learned chancellors who have administered justice in this court.

Intending, therefore, to act on that principle, and not having the least intention to alter it, I will only state what I suppose, if such an impression has existed, must have given rise to it. I have, in common with other judges, of whom Lord Eldon was one, frequently expressed my opinion that in doubtful cases great care ought to be taken by this court not to grant an injunction which is at all likely to prove unfounded; because if it turns out to be unfounded, you are doing an irreparable injury to the party restrained, whereas by withholding it, you may be permitting some injustice, but certainly not an injustice at all equal to that which you are doing by improperly granting it. That rule, however, is confined to cases where there is a serious doubt in the mind of the judge as to whether the title to the injunction is made out or not, for if the court sees that there is a clear case for an injunction it would be absurd to say, go to law and prove that which you have already proved here before I grant the injunction.

In patent cases, however, a rule steps in which is quite consistent with the general rule to which I have just referred, and, indeed, is only an instance of the exception which a correct statement of that rule must always include, viz., that long and uninterrupted possession shall be considered such *prima facie* evidence of title as to justify the court in protecting the patent right by an injunction until its

invalidity, if it be invalid, shall have been established by an action at law.[1]

Having, in conformity with these observations, expressed his concurrence in the Vice-Chancellor's order as regarded the injunction, his Lordship asked whether the order contained any directions with a view to the speedy trial of the action.

Mr. Stuart, for the plaintiff, said that his Honor's usual practice was merely to direct the action to be forthwith brought, with liberty to apply; and, if the plaintiff did not proceed with proper expedition, to dissolve the injunction.

The Lord Chancellor. The defendant ought not to be left to take his chance of the opinion the court may form on the question, what is proper expedition; it is much better for the court to give special directions of its own in the first instance. I propose, therefore, to confirm the Vice-Chancellor's order so far as it continues the injunction pending the action, and directs the action, but to add, that the trial shall be at the sittings after this term, and whatever is required by either side for the purpose of giving effect to that I will order.[2]

[1] In the following cases, in which the plaintiff had enjoyed the patent for considerable time without opposition, or had succeeded in litigation against other parties, temporary injunctions were granted, the plaintiff to proceed speedily to establish his right at law. Boulton *v.* Bull, 3 Ves. Jr. 140; Harmer *v.* Plane, 14 Ves. 130; Russell *v.* Barnsley, 1 Webst. Pat. Cas. 472; Beeston *v.* Ford, 2 Coop. t. Cottenham, 58; Kay *v.* Marshall, 1 M. & Cr. 387 (*semble*); Losh *v.* Hague, Webst. Pat. Cas. 200; Bickford *v.* Skewes, 4 M. & Cr. 500; Muntz *v.* Grenfell, 7 Jur. 121; Newell *v.* Wilson, 2 D. M. & G. 282; Caldwell *v.* Vanvlissengen, 9 Hare, 415; Betts *v.* Menzie, 3 Jur. N. S. 357; Tuck *v.* Silver, Johns. 218; Clark *v.* Ferguson, 1 Giff. 184; Davenport *v.* Richard, 3 L. T. Rep. 503.

By Rolt's Act, 25 & 26 Vict. c. 42, the questions of right to the patent and its infringement must be tried in equity. But, notwithstanding this change in the forum of trial, temporary injunctions continued to be granted upon the same grounds as before this statute. Davenport *v.* Jepson, 4 D. F. & J. 440; Bovill *v.* Goodier, L. R. 2 Eq. 195, 35 Beav. 427; Bovill *v.* Smith, W. N. (1867) 240; Dudgeon *v.* Thomson, 30 L. T. Rep. 244, 22 W. R. 464 S. C.

Neither party can insist upon a jury trial. Davenport *v.* Goldberg, 2 Hem. & M. 282; Bovill *v.* Hitchcock, 3 Ch. Ap. 417; Cochrane *v.* Deener, 94 U. S. 780; Motte *v.* Bennett, 2 Fish. Pat. Cas. 642; Sanders *v.* Logan, 2 Fish. Pat. Cas. 167, 171; Goodyear *v.* Day, 1 Wall. Jr. 283; Farmer *v.* Calvert Co., 1 Flip. 228; Wyckoff *v.* Wagner Co., 88 Fed. 515, 516. In Bovill *v.* Hitchcock, *supra*, Lord Cairns said, p. 419: "If the court thinks it best that a question should be tried before a jury, a jury can be had; but if, in the opinion of the court, a trial without a jury is preferable, neither party can claim a jury as a matter of right. It is a fallacy to say that under the old practice the court required a legal question to be tried by jury. What it required was the judgment of a court of common law. In most cases it was a necessary incident to proceedings at law that there should be the verdict of a jury before judgment; but these cases were sent to law, not that they might be tried by jury, but because this court had no jurisdiction to decide upon legal rights." — Ed.

[2] The injunction was dissolved in July, because of the plaintiff's delay in trying the action. The report of this part of the case is omitted. — Ed.

EDISON ELECTRIC LIGHT CO. *v.* BEACON VACUUM PUMP AND ELECTRICAL CO. AND OTHERS.

CIRCUIT COURT, UNITED STATES, DISTRICT OF MASSACHUSETTS, FEBRUARY 18, 1893.

[54 *Federal Reporter*, 678.]

COLT, Circuit Judge.[1] In May, 1885, the plaintiff brought suit in the United States Circuit Court for the southern district of New York against the United States Electric Lighting Company for infringement of the patent now in controversy, which was granted to Thomas A. Edison, January 27, 1880, for an improvement in electric lamps; and on July 23, 1891, a decree was entered, adjudging the validity of the patent, and ordering an injunction and account. 47 Fed. Rep. 454. Upon appeal to the circuit court of appeals for the second circuit the decree was affirmed in October, 1892. 3 C. C. A. 83, 52 Fed. Rep. 300. Another suit was then brought in the same court against the Sawyer-Man Electric Company, and a preliminary injunction was granted *pro forma* until a decision could be had by the circuit court of appeals, which, on December 19, 1892, affirmed the order, and directed an injunction. Suits were then immediately brought against the Westinghouse Electric Company in Pennsylvania, the Perkins Electric Lamp Company, and the Mather Electric Company in Connecticut, and preliminary injunctions obtained. The present bill was filed January 10, 1893, and the plaintiff now moves for a preliminary injunction against the defendants, based upon the foregoing prior adjudications. This motion is resisted on the ground of newly-discovered evidence bearing on the question of novelty of the Edison invention, which was not before the courts in the other cases. As to these other cases, it is said that there has been but one final adjudication upon the merits, which was in the suit against the United States Electric Lighting Company; that the defendants in the other prior suits were so connected with that company that they were in privity with it, and that therefore injunctions were granted as a matter of course.

The suit against the United States Company was thoroughly and obstinately contested, as is shown by the record, which covers about 6,000 printed pages. The general rule is that where the validity of a patent has been sustained by prior adjudication, and especially after a long, arduous, and expensive litigation, the only question open on motion for a preliminary injunction in a subsequent suit against another defendant is the question of infringement, the consideration of other defenses being postponed until final hearing.[2]

[1] Only a portion of the opinion of the court is given. — ED.

[2] Orr *v.* Littlefield, 1 Woodb. & M. 13; Parker *v.* Brant, 1 Fish. Pat. Cas. 58; Blanchard *v.* Reeves, 1 Fish. Pat. Cas. 103; Potter *v.* Fuller, 2 Fish. Pat. Cas. 251; Potter *v.* Whitney,

The only exception to this general rule seems to be where the new evidence is of such a conclusive character that, if it had been introduced in the former case, it probably would have led to a different conclusion.[1] The burden is on the defendant to establish this, and every reasonable doubt must be resolved against him.

Injunction granted.[2]

1 Low. 87; Robertson *v.* Hill, 6 Fish. Pat. Cas. 465; Green *v.* Gardner, 4 Ban. & A. 169; Colgate *v.* Gold Co., 4 Ban. & A. 415; Gibson *v.* Van Dresar, 1 Blatchf. 532; Mallory Co. *v.* Hickok, 20 Fed. 116; Cary *v.* Lovell Co., 24 Fed. 141; Cary *v.* Domestic Co., 27 Fed. 299; Consol. Co. *v.* Schoenhofen, 28 Fed. 428; Seibert Co. *v.* Mich. Co., 34 Fed. 33; Putnam *v.* Keystone Co., 38 Fed. 234; Brush Co. *v.* Accumulator Co., 50 Fed. 833; Carter *v.* Wollschlaeger, 53 Fed. 573; Blount *v.* Société Anonyme, 53 Fed. 98; Edison Co. *v.* Beacon Co., 54 Fed. 678; Consol. Co. *v.* Accumulator Co., 55 Fed. 485, 53 Fed. 796; Edison Co. *v.* Mt. Morris Co., 58 Fed. 572, 57 Fed. 642; Electric Co. *v.* Edison Co., 61 Fed. 834, 57 Fed. 616; Nat. Co. *v.* Poughkeepsie, 75 Fed. 405, 89 Fed. 1014; Thomson Co. *v.* Union Co., 78 Fed. 363, 365; Thomson Co. *v.* Johns Co., 78 Fed. 364; N. Y. Co. *v.* Jackson, 91 Fed. 422; N. Y. Co. *v.* Loomis Co., 91 Fed. 421; Duff Co. *v.* Norton, 92 Fed. 921; Welsbach Co. *v.* American Co., 98 Fed. 613; Hatch Co. *v.* Electric Co., 100 Fed. 975; Bresnahan *v.* Tripp Co., 102 Fed. 899 (*semble*); American Co. *v.* Burgess Co., 103 Fed. 975 (explaining Westinghouse Co. *v.* Burton, 70 Fed. 619); Electric Co. *v.* Buffalo Co., 117 Fed. 314; Badische Fabrik *v.* Klipstein, 125 Fed. 543 (*semble* — permanent injunction); Brill *v.* Peckham Co., 129 Fed. 139 *Accord.*

Welsbach Co. *v.* Cosmopolitan Co., 100 Fed. 648 *Contra.*

Prior interference suit. — A preliminary injunction will be granted, if an interference suit between the same parties has been decided in the Patent Office in the plaintiff's favor. Hanford *v.* Wescott, 16 O. G. 1181 (*trade mark*); Peck Co. *v.* Lindsay, 2 Fed. 688; Holliday *v.* Pickhardt, 12 Fed. 147; Smith *v.* Halkard, 16 Fed. 414.

But the rule is otherwise if the parties to the interference suit were not the same as the parties to the injunction suit. Edward Barr Co. *v.* N. Y. Co., 32 Fed. 79. — Ed.

[1] A preliminary injunction was denied in the following cases either because of new evidence, or because the prior litigation was collusive, or carried by appeal to a higher court. Grover Co. *v.* Williams, 2 Fish. Pat. Cas. 133; Morris *v.* Lowell Co., 3 Fish. Pat. Cas. 67; American Co. *v.* Elizabeth, 4 Fish. Pat. Cas. 189; Wells *v.* Gill, 6 Fish. Pat. Cas. 89; Sargent Co. *v.* Woodruff, 5 Biss. 444; Spring *v.* Domestic Co., 4 Ban. & A. 427; Bailey Co. *v.* Adams, 3 Ban. & A. 96; Hayes *v.* Leton, 5 Fed. 521; Deter Warner *v.* Bassett, 7 Fed. 468; Coburn *v.* Clark, 15 Fed. 804; Cary *v.* Domestic Co., 24 Fed. 38; Lockwood *v.* Faber, 27 Fed. 63; Glaenzer *v.* Wiederer, 33 Fed. 583; Carey *v.* Miller, 34 Fed. 392; Dickerson *v.* De la Vergne Co., 35 Fed. 143; Eastern Co. *v.* Nixon, 35 Fed. 752; Norton Co. *v.* Hall, 37 Fed. 691; Macbeth Co. *v.* Lippencott Co., 54 Fed. 167; Ney Co. *v.* Superior Co., 56 Fed. 152; Bowers Co. *v.* N. Y. Co., 77 Fed. 980; Société Anonyme *v.* Allen, 84 Fed. 812, 90 Fed. 815; Wilson *v.* Consol. Co., 88 Fed. 286; Blakey *v.* Nat. Co., 95 Fed. 136; Sprague Co. *v.* Nassau Co., 95 Fed. 821; American Co. *v.* Newgold, 99 Fed. 567; Western Co. *v.* Anthracite Co., 100 Fed. 301; Thomson Co. *v.* Exeter Co., 110 Fed. 986; Western Co. *v.* Keystone Co., 115 Fed. 809. — Ed.

[2] A preliminary injunction is regularly granted, if the plaintiff's right to the patent and the defendant's infringement are clear. Ogle *v* Ege, 4 Wash. C. C. 584; Motte *v.* Bennett, 2 Fish. Pat. Cas. 642; Gibson *v.* Van Dresar, 1 Blatchf. 532, Fish. Pat. R. 369 s. c.; Steam Co. *v.* Miller, 8 Fed. 314; Foster *v.* Crossin, 23 Fed. 400; Hat Co. *v.* Davis Co., 32 Fed. 401; Sessions *v.* Gould, 49 Fed. 855; Palmer *v.* Mills, 57 Fed. 221; American Co. *v.* Western Co., 58 Fed. 410; Jensen *v.* Norton, 64 Fed. 662; Phila. Co. *v.* Edison Co., 65 Fed. 551; Bresnahan *v.* Tripp Co., 72 Fed. 920; Continental Co. *v.* Pendergast, 126 Fed. 381.

But such preliminary injunction is sometimes refused on the balance of convenience, the defendant giving a bond to keep account of sales. Howe *v.* Morton, 1 Fish. Pat. Cas. 586; Stainthorp *v.* Humiston, 2 Fish. Pat. Cas. 311; American Co. *v.* Christian, 3 Ban. & A. 42; Blake *v.* Greenwood Co., 14 Blatchf. 342; Spring *v.* Domestic Co., 4 Ban. & A. 427; N. Y. Co. *v.* American Co. 10 Fed. 835; Hoe *v.* Boston Corp., 14 Fed. 914; Hurlbut *v.* Castor, 39 Fed. 802; S. W. Co. *v.* La. Co., 45 Fed. 893; Whitcomb *v.* Girard Co., 47 Fed. 315; Westinghouse Co. *v.* Burton Co., 70 Fed. 619, 77 Fed. 301; Overwright Co. *v.* Cahill, 86 Fed. 338; *Re* Chicago Co., 87 Fed. 750; Nat. Co. *v.* Navy Co., 99 Fed. 565. — Ed.

PLYMPTON *v.* MALCOLMSON.

BEFORE SIR G. JESSEL, M. R., MARCH 4, 1875.

[*Law Reports*, 20 *Equity Cases*, 37.]

THIS was a motion by the plaintiff in the suit, who claimed to be the owner of a patent, for an interim injunction to restrain the defendant from making, selling, or using an article which was alleged to be an infringement of the plaintiff's patent.

The plaintiff's patent was dated the 25th of May, 1865. The defendant had obtained a patent dated the 7th of May, 1874. The plaintiff filed his bill to establish the validity of his patent, and to restrain the defendant from infringing it.

There was no evidence of actual user of the plaintiff's patent except of recent date.

Mr. Webster, Q. C., *Mr. Aston*, Q. C., and *Mr. Lawson*, in support of the motion, contended that the plaintiff's patent had been sufficiently long in existence to entitle him to an interim order for protection. They stated at the bar that the patent had been more or less in use for several years. They cited Dudgeon *v.* Thomson.[1]

Mr. Southgate, Q. C., and *Mr. Hemming*, for the defendant.

SIR G. JESSEL, M. R. When a patentee comes to this court for interim protection on the ground of previous enjoyment, he must show that there has been an actual public user of his patent. In this case there is no evidence of actual user for any number of years. I wish it also to be understood that, where it appears that there is a serious question to be tried at the hearing, it is not the course of this court to grant an injunction on an interlocutory application. I have always thought the rule laid down by Vice-Chancellor Kindersley a sound one, to avoid expressing, as far as possible, on an interlocutory application, an opinion upon the merits of a case; and in accordance with that rule I say no more on the present occasion. Let the present motion stand over till the hearing; the defendant undertaking to keep the usual accounts.[2]

[1] 22 W. R. 464.

[2] The right of the plaintiff or its infringement by the defendant being doubtful, a temporary injunction was refused in the following cases: Hill *v.* Thompson, 3 Mer. 622; Sheriff *v.* Coates, 1 Russ. & M. 159; Curtis *v.* Cutts, 8 L. J. Ch. N. S. 184; Collard *v.* Allison, 4 My. & Cr. 487; Electric Co. *v.* Nott, 2 Coop. *t.* Cott. 41; Bridson *v.* McAlpine, 8 Beav. 229; Whitton *v.* Jennings, 1 Dr. & Sm. 110; Fernie *v.* Young, L. R. 1 H. L. 63, 78; Daw *v.* Eley, W. N. (1868) 232. — ED.

STANDARD ELEVATOR CO. *v.* CRANE ELEVATOR CO.

CIRCUIT COURT OF APPEALS, UNITED STATES, SEVENTH CIRCUIT, MAY 2, 1893.

[56 *Federal Reporter*, 718.]

BEFORE GRESHAM and WOODS, Circuit Judges, and JENKINS, District Judge.

JENKINS, District Judge. The bills of complaint in these two cases were filed by the Crane Elevator Company to enjoin the alleged infringement of certain claims in several patents for improvements in hydraulic elevators. Before answers to the bills the complainants moved for injunctions *pendente lite*, which motions were heard upon bills and answers and upon *ex parte* affidavits, and models constructed by the parties respectively. The court below, at the hearing of the motions, granted preliminary injunctions. The appeal involves the propriety of these preliminary injunctions. The answers deny infringement; deny invention, novelty, and public acquiescence.

The principles upon which courts of equity grant the writ of injunction in advance of a decree upon the merits are elementary. The purpose of the interlocutory writ is not to conclude the question of right but to protect against material injury pending the litigation. In patent cases, to warrant the writ, not only must the infringement be without reasonable doubt, but the rights of the patentee must be clear. Failing prior adjudication in favor of the validity of the patent, there must be shown such continued public acquiescence in the exclusive right asserted as raises a presumption of validity; a presumption not arising from the letters patent, unless accompanied by public acquiescence. The object of the provisional remedy is preventive, largely; and it will not be granted if it is more likely to produce than to prevent, irreparable mischief. If the controversy between the parties be substantial, and not, as to the alleged infringer, colorable, merely, courts of equity are not disposed to adjudicate upon the rights of the parties otherwise than according to the approved usages of chancery, when the defendant's rights might, by the issuance of a writ of injunction, be put in great jeopardy, and the complainant can be compensated in damages. Without passing any opinion upon the complainant's right, or the defendant's infringement, it suffices to say that upon the proofs in the record we cannot declare that the right or the infringement is so clear from doubt as to warrant the issuance of a preliminary injunction. The evidence as to construction of claims and infringement, upon which the court below was called to pass, was largely and necessarily *ex parte*. There was no opportunity of probing the witnesses. Scientific expert evidence is not wholly reliable when not subjected to the search light of intelligent cross-examination. It would, we think, be most unsafe to determine this controversy with-

out full and orderly proof. It would be most unwise to imperil, and presumably wholly ruin, the large capital and interests involved in the business of the appellants, by arresting the enterprise in advance of a final decree, when the damages which the appellee may sustain can be compensated in money. The financial ability of the appellants to so respond has not, in our judgment, been successfully attacked.

The order appealed from will be reversed.[1]

BACON *v.* JONES.

Before Lord Cottenham, C., July 26, 1839.

[4 *Mylne & Craig*, 433.]

This suit was instituted in the month of August, 1835, for the purpose of establishing the plaintiffs' exclusive right to a patent for the manufacture of a gas-lamp burner of an improved construction, called "The Patent Double Cone Gas-burner." The bill alleged that from the time of the granting of the letters patent, which were dated the 2d of July, 1829, until the acts of infringement complained of, the plaintiffs, or those under whom they claimed, had been in the sole and

1 Temporary injunctions were refused in the following cases in which there was doubt as to the plaintiff's right or the defendant's infringement: Isaacs *v.* Cooper, 4 Wash. C. C. 259; Sullivan *v.* Redfield, 1 Paine C. C. 441; Thomas *v.* Weeks, 2 Paine C. C. 92; Parker *v.* Sears, 1 Fish. Pat. Cas. 93 (if defendant is selling his goods at a much lower price, the court will be more inclined to grant a temporary injunction); Day *v.* Candee, 3 Fish. Pat. Cas. 9; Winans *v.* Eaton, 1 Fish. Pat. Cas. 181; North *v.* Kershaw, 4 Blatchf. 70; Furbush *v.* Bradford, 1 Fish. Pat. Cas. 317; Tappan *v.* Nat. Co., 2 Fish. Pat. Cas. 195; Jones *v.* Hodges, Holmes C. C. 37; Fales *v.* Wentworth, Holmes C. C. 96; Mowry *v.* Grand Co., 10 Blatchf. 89; Guidet *v.* Palmer, 10 Blatchf. 217; Hockholzer *v.* Eager, 2 Sawy. 361; Brown *v.* Hinkley, 6 Fish. Pat. Cas. 370; Burleigh Co. *v.* Lobdell, 1 Ban. & A. 625; Jones *v.* Field, 12 Blatchf. 494 (defendant solvent); Gutta Percha Co. *v.* Goodyear Co., 3 Sawy. 542; White *v.* Harris Co., 3 Fed. 161; Kirby Co. *v.* White, 1 Fed. 604; Pullman *v.* Balt. Co., 5 Fed. 72 (injunction would go if defendant were insolvent); De Ver Warner *v.* Bassett, 7 Fed. 468; Cross *v.* Livermore, 9 Fed. 607; Hardy *v.* Marble, 10 Fed. 752; Fish *v.* Domestic Co., 12 Fed. 495; Bradley *v.* Charles Parker Co., 17 Fed. 240; Zinsser *v.* Cooledge, 17 Fed. 538; Swift *v.* Jenks, 19 Fed. 641; Keyes *v.* Pueblo Co., 31 Fed. 560; Edward Barr Co. *v.* N. Y. Co., 32 Fed. 79; Johnson *v.* Aldrich, 40 Fed. 675; Williams *v.* McNeely, 56 Fed. 265; George Co. *v.* Stahl, 65 Fed. 517, 519; Palmer Co. *v.* Newton Co., 73 Fed. 218; Consol Co. *v.* Columbian Co., 73 Fed. 823; Union Co. *v.* Phila. Co., 75 Fed. 1004; Williams *v.* Breitling Co., 77 Fed. 285; Consol. Co. *v.* Finley Co., 106 Fed. 175; Reed Co. *v.* Smith Co., 107 Fed. 719; Marvel *v.* Pearl, 114 Fed. 946; Newhall *v.* McCabe Co., 125 Fed. 919 (revising 117 Fed. 621); Armat Co. *v.* Edison Co., 125 Fed. 939; United Co. *v.* Silver, 128 Fed. 925.

Balance of convenience in favor of injunction. — In the following cases, although there was doubt as to the plaintiff's right or the defendant's infringement, a temporary injunction was granted because less harm would come to the defendant by granting it than would result to the plaintiff by refusing it. Plimpton *v.* Spiller, 4 Ch. Div. 286; Sargent *v.* Seagrave, 2 Curt. 553; Irwin *v.* Dane, 4 Fish. Pat. Cas. 359.

Temporary injunction lost by delay. — In the following cases temporary injunctions were refused because of the delay of the plaintiff in bringing suit. Bridson *v.* Benecke, 12 Beav. 1; Bovill *v.* Crate, L. R. 1 Eq. 388; Hockholzer *v.* Eager, 2 Sawy. 361; Ladd *v.* Cameron, 25 Fed. 37; Keyes *v.* Pueblo Co., 31 Fed. 560; Johnson *v.* Aldrich, 40 Fed. 675; Waite *v.* Chicheston Co., 45 Fed. 258; Palmer Co. *v.* Newton Co., 73 Fed. 218. — Ed.

undisturbed enjoyment of the patent right; but that the defendants had recently infringed the patent by manufacturing and selling gas-burners constructed on the same principle, and which were counterfeits or imitations of the gas-burners of the plaintiffs; and it prayed that the defendants might account for the profits which they had made by the sale of burners so piratically manufactured, and might be perpetually restrained by injunction from infringing the patent in future.

After the bill was on the file, the plaintiffs did not apply for any interlocutory injunction; but upon the answers coming in, denying the validity of the patent and the fact of the alleged infringement, they filed a replication, and went into evidence to prove the originality and usefulness of the patent invention, and the acts of alleged piracy with which they sought to fix the defendants. They afterwards brought on the cause to a hearing, when the Master of the Rolls made a decree dismissing the bill with costs.[1]

The plaintiffs now appealed against that decree.[2]

The Lord Chancellor. The jurisdiction of this court is founded upon legal rights: the plaintiff coming into this court on the assumption that he has the legal right, and the court granting its assistance upon that ground.

When a party applies for the aid of the court, the application for an injunction is made either during the progress of the suit, or at the hearing; and in both cases, I apprehend, great latitude and discretion are allowed to the court in dealing with the application. When the application is for an interlocutory injunction, several courses are open: the court may at once grant the injunction, *simpliciter*, without more — a course which, though perfectly competent to the court, is not very likely to be taken where the defendant raises a question as to the validity of the plaintiff's title; or it may follow the more usual, and, as I apprehend, more wholesome practice in such a case, of either granting an injunction, and at the same time directing the plaintiff to proceed to establish his legal title, or of requiring him first to establish his title at law, and suspending the grant of the injunction until the result of the legal investigation has been ascertained, the defendant in the mean time keeping an account. Which of these several courses ought to be taken, must depend entirely upon the discretion of the court, according to the case made.

When the cause comes to a hearing, the court has also a large latitude left to it; and I am far from saying that a case may not arise in which, even at that stage, the court will be of opinion that the injunction may properly be granted without having recourse to a trial at law. The conduct and dealings of the parties, the frame of the pleadings, the nature of the patent-right, and of the evidence by which it is established, — these and other circumstances may combine to produce such a result; although this is certainly not very likely to

[1] 1 Beav. 382.

[2] The arguments of counsel are omitted. — Ed.

happen, and I am not aware of any case in which it has happened.[1] Nevertheless, it is a course unquestionably competent to the court, provided a case be presented which satisfies the mind of the judge, that such a course, if adopted, will do justice between the parties

Again, the court may, at the hearing, do that which is the more ordinary course; it may retain the bill, giving the plaintiff the opportunity of first establishing his right at law. There still remains a third course, the propriety of which must also depend upon the circumstances of the case, that of at once dismissing the bill.

With respect to the first of these three courses, I think it will hardly be contended that the present is a case in which the court would grant a perpetual injunction *simpliciter*. And the only question which I have to consider (and it is the same which the Master of the Rolls stated that he had to consider) is, whether this is a case in which the court ought to retain the bill for the sake of giving the plaintiffs the opportunity of now establishing their title by a proceeding at law, or whether it is not a case in which the court ought to dismiss it, leaving the plaintiffs to such rights at law as they may be advised to assert.

Generally speaking, a plaintiff who brings his cause to a hearing is expected to bring it on in such a state as will enable the court to adjudicate upon it, and not in a state in which the only course open is to suspend any adjudication until the party has had an opportunity of establishing his title by proceedings before another tribunal. And I think the court would take a very improper course, if it were to listen to a plaintiff who comes forward at the hearing, and asks to have his title put in a train for investigation, without stating any satisfactory reason why he did not make the application at an earlier stage. When he comes forward upon an interlocutory motion, the court puts the parties in the way of having their legal title investigated and ascertained; but when a plaintiff has neglected to avail himself of the opportunity thus afforded, it becomes a mere question of discretion, how far the court will assist him at the hearing, or whether it will then assist him at all.

If, indeed, any circumstances had occurred to deprive him of that opportunity in the progress of the cause, the question might have been different. But in this case I have not heard any reason suggested why the plain and ordinary course was not taken by the plain-

[1] A permanent injunction was granted in Crossley *v.* Derby Co. (1834) 4 L. J. Ch. N. S. 25, without having recourse to a trial at law.

Permanent injunctions were granted in the following cases: Frearson *v.* Loe, 9 Ch. D. 48 (no actual, but only a threatened infringement, but latter is enough); Werner Motors *v.* Gamage (1904) 1 Ch. 264; Birdsell *v.* Shaliol, 112 U. S. 485; Cantrell *v.* Wallick, 117 U. S. 689; Whitney *v.* Fort, 2 Fish. Pat. Cas. 657, cited; Mott *v.* Bennett, 2 Fish. Pat. Cas. 642; Stainthorp *v.* Elkinton, 1 Fish. Pat. Cas. 349; Stainthorp *v.* Humiston, 1 Fish. Pat. Cas. 475; Blake *v.* Rawson, 6 Fish. Pat. Cas. 74; Goodyear Co. *v.* Willis, 1 Flip. 388; Shuter *v.* Davis, 16 Fed. 564; Massett *v.* Johnston, 59 Fed. 613; Consol. Co. *v.* Columbian Co., 79 Fed. 795; Sprague Co. *v.* Nassau Co. 97 Fed. 609; N. Y. Co. *v.* Jackson, 112 Fed. 678, 1021; Reed Co. *v.* Smith Co., 117 Fed. 322; Consol. Co. *v.* Winters, 119 Fed. 614; Cayuta Co. *v.* Kennedy Co., 127 Fed. 355. — ED.

tiffs, of previously establishing their right at law. They might have brought their action before filing the bill, or they might, after the bill was on the file, have had their right put in a train for trial. Instead of that, they have allowed the suit to remain perfectly useless to them for the last four years. They knew of the alleged infringement in the month of August, 1835; and from that time till the hearing there was no moment at which they might not, by applying to the court, have had liberty to bring an action to establish their title at law.

It is obvious that such a line of proceeding exposes a defendant to inconveniences which are by no means necessary for the protection of the plaintiff. It is no trifling grievance to a defendant to have a chancery suit hanging over him for four years, in which, if the court shall so determine at the hearing, he will have to account for all the profits he has been making during the intermediate period. Is a defendant to be subject to this annoyance without any absolute necessity, or even any proportionate advantage to his adversary, and without that adversary being able to show any reason why he did not apply at an earlier time? It appears to me that it would be very injurious to sanction such a practice, more especially when I can find no case in which the court has thought it right to retain a bill, simply for the purpose of enabling a plaintiff to do that which these plaintiffs might have done at any time within the last four years.

It was much more regular and proper that the plaintiffs should have taken steps for putting the legal right in a course of trial. Those steps they have not chosen to take; and it is now impossible to put the defendants in the same position in which they would have stood if such a course had been originally adopted.

For these reasons I am of opinion, that the Master of the Rolls, finding that the evidence in the cause was not such as he could act upon with safety, came, in the exercise of his discretion, to a sound conclusion, when he refused to grant the injunction or retain this bill.

I have purposely abstained from saying anything as to the legal rights of the parties, because I do not think the case is in such a state as to enable me to adjudicate upon it.

The appeal must be dismissed with costs.[1]

[1] Norton *v.* Nichols, 4 K. & J. 475 *Accord.* — Ed.

CAYUTA WHEEL AND FOUNDRY CO. *v.* KENNEDY VALVE MANUFACTURING CO.

CIRCUIT COURT, UNITED STATES, SOUTHERN DISTRICT OF NEW YORK, DECEMBER 18, 1903.

[127 *Federal Reporter*, 355.]

WHEELER, District Judge.[1] This suit is brought upon patent No. 631,545, dated August 22, 1899, and granted to Christian E. Loetzer, for a hydrant, with a very long and complicated specification, and twenty claims, all of which but the nineteenth are alleged to have been infringed. The defense is that infringement had wholly ceased before suit brought, leaving the remedy, if any, wholly at law.

As to the ceasing of infringement before suit brought, the defendant relies upon General Electric Co. *v.* The New England Electric Mfg. Co.[2] where, on a plea that the defendant had wholly ceased and was not threatening and did not intend to further infringe, but had in good faith finally abandoned such manufacture and sale, it was held that the remedy for prior infringement would not be in equity.[3] But in this case the bill is in the usual form for infringement of a patent. The defendant denies validity of the patent, and does not in any way set up that any right to infringe by continuing the manufacture and sale had been abandoned, or that infringement was not further intended. This difference in the pleadings distinguishes this case from the opinion of Judge Platt in the case cited and relied upon.

Decree for the plaintiff.[4]

CAMPBELL PRINTING PRESS AND MANUFACTURING CO. *v.* MANHATTAN RAILWAY CO.

CIRCUIT COURT, UNITED STATES, SOUTHERN DISTRICT OF NEW YORK, MARCH 9, 1892.

[49 *Federal Reporter*, 930.]

LACOMBE, Circuit Judge.[5] The bill charges infringement of the second claim, prays injunction and accounting, and expressly waives answer under oath. A preliminary injunction was refused. Campbell

[1] Only a part of the opinion is given. — ED.

[2] (C. C.) 123 Fed. 310.

[3] Proctor *v.* Bayley, 42 Ch. Div. 390 *Accord.* — ED.

[4] Werner Motors *v.* Gamage, [1904] 1 Ch. 264 *Accord.*

Injunctions were issued in the following cases of infringement although the defendant announced his intention not to infringe again. Losh *v.* Hague, 1 Webst. Pat. Cas. 200; Millington *v.* Fox, 3 M. & Cr. 338; Geary *v.* Norton, 1 De G. & Sm. 9. But see Proctor *v.* Bayley, 42 Ch. Div. 390. — ED.

[5] A small part of the opinion of the court is omitted. — ED.

Printing-Press & Manuf'g Co. *v.* Manhattan Ry. Co.[1] The case now comes up for final hearing upon bill, answer, and replication. The answer (unverified) admits the grant of the letters patent, and complainant's title thereto, and that they are good and valid as to the second claim thereof. It further admits that since April 16, 1889 (the date of the issue of the patent) defendant has issued couplings embodying the invention covered by the second claim, and that the number so used is 2,678, on 1,017 cars and 322 locomotives, some of said couplings having been applied before April 16, 1889, and others from time to time since. It further avers that the invention is of trifling, if any, pecuniary value; that complainant has never made, used, or sold the patented invention, and has never licensed any one to make, use, or sell the same; that the defendant uses it upon cars constantly employed by it in the transportation of passengers, and that an injunction would be a hardship to defendant, would seriously inconvenience it in its passenger carrying service, and would be of no benefit to complainant. It offers to submit to a final decree for injunction against the use of any additional infringing couplings. For the past and future undisturbed use of those which it has placed upon its cars, without leave or license of the owner of the patent, and in admitted violation of the rights secured to such owner thereby, it also offers to submit to a judgment for nominal damages.

The contention of the defendant that, because it is willing to pay nominal damages for past infringement, an injunction to restrain future infringement should not issue, is unsound. In Birdsell *v.* Shaliol[2] the supreme court held that "an infringer does not, by paying damages for making and using a machine in infringement of a patent, acquire any right himself to the future use of the machine. On the contrary he may, in addition to the payment of damages for past infringement, be restrained by injunction from further use [citing authorities]." See, also, Matthews *v.* Spangenberg;[3] Bragg *v.* City of Stockton.[4] The proposition advanced by the defendant is practically this: If an inventor, whose patented improvement in locomotive machinery, although valid, is of but trifling value to a common carrier, himself thinks it valuable, and therefore demands a license fee for its use, higher than such common carriers as would like to use it are willing to pay, they may nevertheless appropriate his invention to their use, may place it on their cars and locomotives without his permission, and may continue to use it till it wears out, without interference, on the ground that to remove it would inconvenience the public; and that for such enforced license they should be made to pay, not the fee the inventor asks, but such sum as a master of the court may think the invention is worth. Baldly stated, the contention is that, when a patentee asks a price for the use of his patent higher than users wish to pay, and refuses to license its use except at such price, it may be confiscated and sold to whoever wants it, at a price

[1] 47 Fed. Rep. 663.
[2] 112 U. S. 487, 5 Sup. Ct. Rep. 244.
[3] 15 Fed. Rep. 813.
[4] 27 Fed. Rep. 509.

to be fixed by a United States circuit court. Whether or not such a qualification of the monopoly secured by letters patent would be desirable legislation is immaterial; it is not now on the statute book, nor is there found controlling authority in its support among the cases cited by the defendant's counsel.

Lowell Manuf'g Co. *v.* Hartford Carpet Co.[1] is plainly an authority only under the facts of that particular case, which are stated too briefly in the report to afford much information as to what the court did decide. In Forbush *v.* Bradford [2] Judge Curtis refused a temporary injunction, where the same issues had been tried at law between the same parties, such trial resulting in a verdict for the plaintiff; but he did so on the express ground that a bill of exceptions had been taken upon points which involved the validity of the patent, and that, as the bill of exceptions was not frivolous, the litigation as to complainant's title was not in fact terminated, and it was necessary, in weighing the relative hardship of granting or refusing an injunction, to contemplate a decision adverse to complainant's title as a possible result. But the learned judge expressly added that, even though the effect of an injunction would be to stop all the defendant's looms till the patented improvement could be removed, that would not prevent the court from granting an injunction if the right had been finally established at law. In the case at bar, where neither validity, title, nor infringement is questioned, the complainant's right to its monopoly is finally established. In McCrary *v.* Canal Co.[3] injunction was refused where defendants were using complainant's "improvement in coupling and steering canal-boats," on the ground that the "allowance of an injunction would cause much greater injury to the respondent than benefit to the complainant." Defendants were contending that the patent was an invalid reissue. Although the circuit court did not sustain that or the other defenses, the defendants still had their appeal, and it could not be held that all questions of validity, title, and infringement had been finally determined. As no facts are stated in the report of the case, it does not appear what was the respective injury or benefit. In the case at bar the only injury to the defendant is the cost of substituting some other coupling; it expressly repudiated (on the former motion) any benefit from the improvement, insisting that other couplings which it was free to use were better than complainant's. By refusing an injunction, the court practically informs the complainant, and all who may wish to use its couplings, that, because it asks more for the improvement than they are willing to pay, it must nevertheless be content to see them appropriate it at a price to be fixed hereafter by this court. On which side the balance of hardship in this case inclines seems not difficult to determine.

The remarks of Judge Grier in Sanders *v.* Logan [4] are purely *obiter*, the bill in that case being dismissed on the ground that prior use was

[1] 2 Fish. Pat. Cas. 475.
[2] 1 Fish. Pat. Cas. 318.
[3] 5 Fed. Rep. 367.
[4] 2 Fish. Pat. Cas. 167.

shown. Besides, the learned judge evidently assumed that the license fee, payment of which would be full compensation to the complainant for future as well as past trespasses, was a "fixed sum." Undoubtedly where there is a given license fee which is paid by others for the use of an improvement in some "mill, manufactory, locomotive, or steam engine," equity will not lend its aid to enable a patentee, by an injunction, practically against the whole apparatus, to extort a larger sum from some particular infringer who is prepared to pay the "given sum" for the privilege of using the improvement. But that is not this case. There is no "fixed sum," for there have, as yet, been no actual sales of licenses, other railroads (as was stated on the argument) having followed defendant's example, and appropriated the new coupling without payment or permission, expecting, apparently, by that means to be able to compel the complainant to accept much less than he would sell his license for, except under some such constraint, — perhaps a merely nominal sum, — for, although it seems to have kept putting his coupling on its cars, even after it had tested it by use, defendant yet insists that it is a wholly valueless improvement.

The decision of Judge Blodgett in Hoe *v.* Knap[1] fully sustains the defendant's contention. In that case the owner of the patent was a large manufacturer of printing-presses, which he did not keep in stock, but made to order. The patented device was a small part of the entire machine. As matter of fact, complainant had not up to that time sold any press embodying the improvement, because none had been ordered. Apparently he thought it for his best business interest to hold the patent, and use it exclusively in presses of his own make, and hence had no regular license fee for its use. (Judge Blodgett, however, at final hearing, refused an injunction against an infringer, holding that "under a patent which gives a patentee a monopoly, he is bound either to use the patent himself, or allow others to use it, on reasonable terms.") No authorities for this proposition, however, are cited in the opinion,[2] nor is such a construction of the statute, which provides that a patentee shall receive a grant of the "exclusive right to make, use, and vend" his invention, supported by argument. Although great weight is always to be given to decisions of the circuit courts, they are not controlling authority when the same question is presented in another circuit. I do not, therefore, feel constrained by this decision to refuse the complainant its injunction, because it asks more for a license than defendant cares to pay.

Defendant also insists that injunction should not issue because the infringing couplings now in use by it are used in the service of the public, and to enjoin would be to work great hardship to the public. In Bliss *v.* Brooklyn[3] injunction was refused because the hose

[1] 27 Fed. 204.

[2] The following authorities are against the *dictum* of Judge Blodgett: Bement *v.* Nat. Co., 186 U. S. 70, 90; Wirt *v.* Hicks, 46 Fed. 71; Wyckoff *v.* Wagner Co., 88 Fed. 515. See also Davenport *v.* Jepson, 4 D. F. & J. 440, 447. — Ed.

[3] 4 Fish. Pat. Cas. 596.

couplings complained of were necessary for the daily use of the city in the prevention of fires; and there is a long line of authorities to the same effect.[1] There is, however, nothing in the case at bar, beyond the bare assertion of the defendant, to show that an injunction properly regulated as to time may not be obeyed without in any way interfering with the service which defendant renders to the public as a common carrier of passengers. It seems to have experienced no difficulty at all in temporarily withdrawing its locomotives and cars from such service at suitable seasons, for a sufficient length of time to affix the complainant's couplings. Why it may not, in like manner, remove them, does not appear. Complainant may take decree for account and injunction. The terms of the injunction, providing from how many cars and locomotives the infringing couplings shall be removed each week, may be settled on notice; and if defendant will at that time present affidavits showing the character of the work required, the amount of its rolling stock in use and reserve, and its shop facilities, there need be no difficulty about arranging the terms of the decree; or, if it be preferred, defendant, instead of affidavits, may present its superintendent or master mechanic for examination to aid the court in settling the terms.[2]

IDE AND OTHERS *v.* THORLICHT AND OTHERS.

CIRCUIT COURT OF APPEALS, UNITED STATES EIGHTH CIRCUIT, APRIL 21, 1902.

[115 *Federal Reporter*, 137.]

BEFORE Caldwell, Sanborn, and Thayer, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.[3]

The next question for consideration is the measure of the recovery to which the complainants are entitled for the alleged infringement of the two valid claims. Counsel for the defendants insist that no relief can be granted to the complainants, because they have been guilty of laches in prosecuting their suit, and because the defendants are innocent of the charge of infringement. The charge of laches is conditioned by these facts: This patent was issued on February 5, 1889. The defendants in this case include the manufacturers of the engine which is alleged to infringe and a purchaser thereof. On May 23,

[1] See also Ballard *v.* Pittsburg, 12 Fed. 783. — ED.

[2] In the following cases it was thought that a permanent injunction might be refused because of the greater injury to the defendant by granting it than to the plaintiff by denying it: Sanders *v.* Logan, 2 Fish. Pat. Cas. 167; Lowell Co. *v.* Hartford Co., 2 Fish. Pat. Cas. 472; Dorsey Co. *v.* Marsh, 6 Fish. Pat. Cas. 387; McCrary *v.* Pa. Co., 5 Fed. 367; Hoe *v.* Boston Corp., 14 Fed. 914, 916 (*semble*); Smith *v.* Sands, 24 Fed. 470; Hoe *v.* Knap, 27 Fed. 204.

[3] Only so much of the opinion is given as relates to laches and acquiescences. — ED.

1894, Ide notified the manufacturers that they were infringing upon this patent. On July 14, 1899, the executors of Ide's will exhibited this bill. In the mean time a spirited litigation had been conducted between Ide and the manufacturers over the former's claims under other patents. The statute of limitations of the State of Illinois — the state in which the defendants have committed their alleged trespasses — bars the commencement of actions for the recovery of damages for infringement five years after the damages accrue. Hurd's Rev. St. Ill. 1899, p. 1119, § 15.

But there is no rule of law, of equity, or of morals that requires a patentee to sue infringers upon all the patents he owns at the same time, or that deprives him of the equitable relief to which he would otherwise be entitled because he has failed to do so. And while courts of equity usually apply the doctrine of laches by analogy to the statute of limitations of similar actions at law, that rule has no application to this suit, because the trespasses of the defendants for which the complainants now seek relief have been continuous and repeated, and are still continuing, and no bar to a recovery of all the damages which have resulted from them within five years of the commencement of this suit, or to the issue of an injunction to prevent their continuance, has arisen even under the statute of Illinois. The doctrine of laches is an equitable principle, which is applied to promote, but never to defeat, justice. Under ordinary circumstances a suit in equity will not be stayed before, and will be stayed after, the time fixed by the analogous statute of limitations at law. But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. Kelley *v.* Boettcher.[1] There are no unusual circumstances or conditions in this case which appeal to a court of equity to stay this suit while a similar suit is not barred by the statutes of Illinois. Unreasonable delay and the deceitful acts or silence of a patentee which induce an infringer to incur expenses or to become liable to losses and damages which he would not otherwise have suffered may sometimes justly induce a court of equity to stay his suit for an infringement or for an accounting before the time fixed by the analogous statute of limitations has expired.[2] But delay, un-

[1] 85 Fed. 55, 62, 29 C. C. A. 14, 21.

[2] By reason of the plaintiff's conduct amounting to acquiescence his bill was dismissed in Lane Co. *v.* Locke, 150 U. S. 193; Keyes *v.* Eureka Co., 158 U. S. 150; Woodmanse Co. *v.* Williams, 68 Fed. 489; Richardson *v.* Osborne Co., 82 Fed. 95; Meyrowitz Co. *v.* Eccleston, 98 Fed. 437; and a temporary injunction was refused in Keyes *v.* Pueblo Co., 31 Fed. 560.

The plaintiff's conduct, not amounting to acquiescence, was no bar to injunctions in the following cases: —

Permanent injunctions. — N. Y. Co. *v.* Buffalo Co., 18 Fed. 638; Kittle *v.* Hall, 29 Fed. 508; Price *v.* Joliet Co., 46 Fed. 107; Bragg Co. *v.* Hartford, 56 Fed. 292; Taylor *v.* Sawyer Co., 75 Fed. 301.

Temporary injunctions. — Caldwell *v.* Vanvlissingen, 9 Hare, 415; Van Hook *v.* Pendle-

accompanied by such deceitful acts or silence of the patentee, and by such facts and circumstances as practically amount to an equitable estoppel, will warrant no such action. It is no answer to an application for an injunction to restrain a defendant from committing waste by cutting trees from the owner's land that, because the latter has taken no steps to prevent the wrongdoer from cutting one half of the trees, he has thereby acquired a right to cut the other half. Attorney-General *v.* Eastlake.[1] And it is no defense to a suit for an injunction and an accounting on account of the continuing trespasses of an infringer that the latter has been trespassing on the rights of the patentee for years with impunity. Menendez *v.* Holt;[2] McLean *v.* Fleming;[3] Price *v.* Steel Co.;[4] New York Grape Sugar Co. *v.* Buffalo Grape Sugar Co.;[5] Gilmore *v.* Anderson;[6] Brush Electric Co. *v.* Electric Imp. Co.;[7] Taylor *v.* Spindle Co.;[8] Bragg Mfg. Co. *v.* City of Hartford.[9]

The decree below must be reversed, the appellants may recover one half of their costs in this court, and the case must be remanded to the circuit court with directions to dismiss the bill as to the three claims of the reissued patent No. 11,730, and to enter the usual decree for an injunction and an accounting upon claims 3 and 4 of letters patent No. 397,293, without costs to either of the parties to the suit up to the time of the entry of the decree; and it is so ordered.

HEAD *v.* PORTER.

CIRCUIT COURT, UNITED STATES, DISTRICT OF MASSACHUSETTS, OCTOBER 1, 1895.

[70 *Federal Reporter*, 498.]

COLT, Circuit Judge.[10] This is a motion to dismiss a bill in equity upon the ground that by reason of the death of the defendant the suit has abated, and cannot be revived. The bill is brought for the infringement of a patent, and contains the usual prayer for an injunction and an account of profits.[11] The usual mode of procedure where

ton, 1 Blatchf. 187, 193; Green *v.* Gardner, 4 Ban. & A. 169; Brush Co. *v.* Electric Co., 45 Fed. 241; Edison Co. *v.* Mt. Morris Co., 58 Fed. 572, 57 Fed. 642; N. Y. Co. *v.* Jackson, 91 Fed. 422; Steam Co. *v.* Brown, 114 Fed. 939. — ED.

[1] 11 Hare, 205, 228.
[2] 128 U. S. 514, 523, 9 Sup. Ct. 143, 32 L. Ed. 526.
[3] 96 U. S. 245, 253, 24 L. Ed. 828.
[4] (C. C.) 46 Fed. 107, 108.
[5] (C. C.) 18 Fed. 638, 646.
[6] 38 Fed. 846, 848.
[7] (C. C.) 45 Fed. 241, 243.
[8] 22 C. C. A. 203, 206, 75 Fed. 301, 304.
[9] (C. C.) 56 Fed. 292, 294.
[10] Only a portion of the opinion is given. — ED.

[11] It is well settled that a plaintiff who obtains a permanent injunction against the infringer of a patent is entitled in this same suit to a decree for an account of profits. Penn *v.* Bibby, L. R. 3 Eq. 308; Elmslie *v.* Boursier, 9 Eq. 217; Hurlbut *v.* Schillinger, 130 U. S. 456; Crosby Co. *v.* Consol. Co., 141 U. S. 491; Motte *v.* Bennett, 2 Fish. Pat. Cas. 642; Bragg *v.* Stockton, 27 Fed. 509; Penfield *v.* Potts Co., 126 Fed. 475.

It is equally well settled that, if the plaintiff is not entitled at the time of bill filed to an

the defendant dies pending suit is for the complainant to bring a bill of revivor, and for the defendant to raise the question of the survival of the action by demurrer to the bill; but, since the question has been fully argued on the present motion, I will proceed to consider it.

The proposition relied upon in support of the motion is that a suit for the infringement of a patent, being essentially an action of tort for damages, does not survive at common law or by statute; that this applies to bills in equity as well as actions at law, because "whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it." Schreiber *v.* Sharpless.[1] There have been five cases in the circuit courts in which this question has been passed upon. In four of these it was held that a bill in equity for the infringement of a patent is not finally determined by the death of the defendant, and that the abatement may be arrested by bill of revivor. Smith *v.* Baker (decided by Judge McKennan in 1874);[2] Atterbury *v.* Gill (decided by Judge Welker in 1877);[3] Kirk *v.* Du Bois (decided by Judges McKennan and Acheson in 1886);[4] Hohorst *v.* Howard (decided by Judge Lacombe in 1888).[5] The remaining case — Draper *v.* Hudson (decided in 1873)[6] — can hardly be considered an authority in conflict with these cases, in view of the ground on which that decision rests, and the subsequent case of Atwood *v.* Portland Co.,[7] in which, speaking of Judge Shepley's decision in Draper *v.* Hudson, Judge Lowell[8] says, "As an authority in this court, his decision is not binding." Draper *v.* Hudson was not put upon the ground that the action did not survive at common law, but that it became abated because the principal relief failed. The court says: "When the title to the principal relief, which is the proper subject of a suit in equity, — the injunction and discovery, — fails, the incident right to an account fails also." This is not the law. It is now settled that where a bill in equity is brought upon a patent, and during the pendency of the suit the right to an injunction fails by reason of the expiration of the patent, the suit is not determined, but the court will proceed to administer the other relief sought.[9] Beedle

injunction, he cannot obtain an account of profits of past infringement. Smith *v.* London Co., Kay, 408; Price Co. *v.* Bauwen's Co., 4 K. & J. 727; Proctor *v.* Bayley, 42 Ch. Div. 390; Root *v.* R. R. Co., 105 U. S. 189; Hayward *v.* Andrew, 106 U. S. 672; Vaughan *v.* Central Co., 4 Sawy. 280; Lord *v.* Whitehead, 24 Fed. 801; Adams *v.* Bridgewater Co., 26 Fed. 324; Creamer *v.* Bowers, 30 Fed. 185; N. Y. Co. *v.* N. J. Co., 47 Fed. 504, 48 Fed. 556; Germaine *v.* Wilgus, 67 Fed. 597; Russell *v.* Kern, 69 Fed. 94.

The following cases to the contrary are overruled: Nevins *v.* Johnson, 3 Blatchf. 80; Perry *v.* Corning, 6 Blatchf. 134; Howes *v.* Nute, 4 Cliff. 173; Stevens *v.* Kansas Co., 5 Dill. 486; Vaughan *v.* East Tenn. Co., 2 Ban. & A. 537; Sayles *v.* Dubuque Co., 3 Ban. & A. 219; Gordon *v.* Anthony, 16 Blatchf. 234; Atwood *v.* Portland Co., 10 Fed. 283. — Ed.

[1] 110 U. S. 76, 80, 3 Sup. Ct. 423.
[2] 1 Ban. & A. 117, Fed. Cas. No. 13,010.
[3] 3 Ban. & A. 174, Fed. Cas. No. 638.
[4] 28 Fed. 460.
[5] 37 Fed. 97.
[6] Holmes, 208, Fed. Cas. No. 4069.
[7] 10 Fed. 283.
[8] Page 284, Holmes, Fed. Cas. No. 4069.
[9] McRea *v.* Holdsworth, 6 Ch. Ap. 418, affirming 18 W. R. 489; Davenport *v.* Rylands, L. R. 1 Eq. 302 (decided under Cairns's Act and nullifying Price *v.* Bauwen, 4 K. & J. 727); Neilson *v.* Betts, L. R. 5 H. L. 1, 9; Parks *v.* Booth, 102 U. S. 96 (explained in Root *v.* R. R. Co., 105 U. S. 204); Consol. Co. *v.* Crosby Co., 113 U. S. 157; Clark *v.* Wooster, 119 U. S. 322; Beedle *v.* Bennett, 122 U. S. 71; Busch *v.* Jones, 184 U. S. 598; Blank *v.*

v. Bennett;[1] Clark v. Wooster;[2] Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.[3] In case of the death of the plaintiff, a bill in equity for the infringement of a patent does not abate, but may be prosecuted to final judgment by his representatives. Railroad Co. v. Turrill;[4] May v. Logan Co.[5] If this motion is to be determined on the authority of adjudged cases, it should be denied. But it is strenuously contended that, assuming this cause of action might have survived previous to Root v. Railway Co.,[6] the decision in that case so modified or changed the law that it does not now survive. Upon this assumption, Kirk v. Du Bois and Hohorst v. Howard, *supra*, were wrongly decided, since they arose after the decision in Root v. Railway Co. The reasoning of counsel is as follows: In the decisions previous to Root v. Railway Co., the right of recovery in a bill in equity for the infringement of a patent was based upon the theory of a fiduciary relation between the patentee and wrongdoer, whereby the infringer became a trustee of the profits for the use of the owner of the patent, and liable to account as such; that this doctrine was overthrown in Root v. Railway Co.; and that it follows that an action for infringement, whether at law or in equity, is a simple tort for the recovery of damages which does not survive. It is necessary, therefore, to find out the scope of the decision in Root v. Railway Co., and its bearing on the present motion. The single question determined in that case, in the language of Mr. Justice Matthews, speaking for the court (page 215), was as follows: —

"Our conclusion is that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement."

Root v. Railway Co. does not touch the question whether a bill in equity for relief against infringements of a patent abates by reason of the death of the defendant, but it simply decides that equitable jurisdiction in a bill for a naked account against an infringer cannot be sustained upon the doctrine that the wrongdoer is a trustee of his

Manuf'g Co., 3 Wall. Jr. 196, 4 Blatchf. 229 s. c.; Sickles v. Gloucester Co., 1 Fish. Pat. Cas. 222; Imlay v. Norwich Co., 4 Blatchf. 227; Jordan v. Dobson, 2 Abb. U. S. 398; Bignall v. Harvey, 18 Blatchf. 353; Emigh v. Baltimore Co., 6 Fed. 283; N. Y. Co. v. Peoria Co., 21 Fed. 878; Dicks v. Struthers, 25 Fed. 103; Adams v. Bridgewater Co., 26 Fed. 324; Singer Co. v. Wilson Co., 38 Fed. 586; Ross v. Fort Wayne, 63 Fed. 466; Chinnock v. Paterson Co., 112 Fed. 531 *Accord*.

If, however, the suit is brought so shortly before the expiration of the patent that even a temporary injunction could not be obtained before it expires, the bill will be dismissed. Betts v. Gallias, 10 Eq. 392; Clark v. Wooster, 119 U. S. 322 (*semble*); Keyes v. Eureka Co., 158 U. S. 150, 154; American Co. v. Chicago Co., 41 Fed. 522; American Co. v. Citizens Co., 44 Fed. 484; Bragg Co. v. Hapgood, 56 Fed. 290; Russell v. Kern, 69 Fed. 94. — Ed.

[1] 122 U. S. 71, 7 Sup. Ct. 1090.
[2] 119 U. S. 322, 7 Sup. Ct. 217.
[3] 113 U. S. 157, 5 Sup. Ct. 513.
[4] 110 U. S. 301, 303, 4 Sup. Ct. 5.
[5] 30 Fed. 250.
[6] (1881) 105 U. S. 189.

gains for the use of the owner of the patent, and that some recognized ground of equitable relief must appear in the bill.

The present bill prays for an injunction as well as an account of profits, and is, therefore, a case within the jurisdiction of a court of equity. It not only asks for an injunction against future infringements, but it calls upon the wrongdoer to refund the profits he has made, "as it would be inequitable that he should make a profit out of his own wrong." Profits are the gains or savings made by the wrongdoer by the invasion of the complainant's property right in his patent. They are the direct pecuniary benefits received, and are capable of a definite measurement. Calling them the "measure of damages in equity" does not mean that they are the same as damages in an action at law. They are clearly not the same. "Profits in equity are the gain, or saving, or both, which the defendant has made by employing the infringing invention. This gain or saving is a fact. It is an actual pecuniary benefit which has resulted directly from the defendant's wrongful use of the plaintiff's property, which he has had and enjoyed, and to which, on equitable theories, the plaintiff is entitled." 3 Rob. Pat. § 1062, note 7, par. 3. At law damages may include profits, but they also include other elements necessary to make up the actual loss, and to give full compensation to the injured party. They may be still further increased by way of punishment for the wrong. But equity, unless by statute, exacts nothing by way of loss or punishment from the wrongdoer except his actual gains. In Elizabeth *v.* Pavement Co.,[1] Mr. Justice Bradley, speaking for the court (page 138), said: —

"But one thing may be affirmed with reasonable confidence, — that, if an infringer of a patent has realized no profit from the use of the invention, he cannot be called upon to respond for profits. The patentee, in such case, is left to his remedy for damages. It is also clear that a patentee is entitled to recover the profits that have been actually realized from the use of his invention. . . . It may be added that, where no profits are shown to have accrued, a court of equity cannot give a decree for profits, by way of damages, or as a punishment for the infringement. Livingston *v.* Woodworth.[2] But when the entire profit of a business or undertaking results from the use of the invention, the patentee will be entitled to recover the entire profits, if he elects that remedy."

Referring to that case in Root *v.* Railway Co., the court (page 203) said: —

"Accordingly, in that case, the bill was dismissed as to the city of Elizabeth, which had infringed, because it appeared that it had made no profit from the use of the patented improvement, while a decree was rendered against the contractor who had laid the pavement which was the subject of the patent, because he was shown to have made profits from the infringement. The municipal corporation, of course, remained liable to respond in damages in an action at law for any loss which the plaintiff could have established by proof."

[1] 97 U. S. 126. [2] 15 How. 559.

By the act of July 8, 1870, c. 230 (16 Stat. 206), the complainant in a bill in equity brought for the infringement of a patent is entitled to recover, in addition to the profits, the damages he has sustained. In referring to this statute in Birdsall *v.* Coolidge,[1] the court (page 69) said: —

"Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event the provision is that the complainant 'shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby.'" [2]

In referring to that case in Root *v.* Railway Co. it is (page 201) declared: —

"The whole force of the change in the statute consists in conferring upon courts of equity, in the exercise of their jurisdiction in administering the relief which they are accustomed and authorized to give, and which is appropriate to their forms of procedure, the power not merely to give that measure of compensation for the past, which consists in the profits of the infringer, but to supplement it, when necessary, with the full amount of damage suffered by the complainant, and which, if he had sued for that alone, he would have recovered in another form." [3]

The general rule that personal actions die with the person does not apply where property is acquired which benefits the testator. In the language of the supreme court in U. S. *v.* Daniel: [4] —

"Where, by means of the offense, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor." [5]

An invention involves the conception of means, which, when embodied in a concrete form, may become the subject of a patent. "It is a mental result, . . . and the machine, process, or product is but

[1] 93 U. S. 64.

[2] For cases decided under the act of July 8, 1870, c. 230 (16 Stat. 206), see Andrews *v.* Creegan, 7 Fed. 477; Chapman *v.* Ferry, 12 Fed. 693. — Ed.

[3] *Injunction and damages.* — In England, also, by the Chancery Amendment Act, 1858, a plaintiff who obtains an injunction against the infringement of a patent is entitled in the same suit to compensation for past infringement, as distinguished from an account of profits received by the defendant. Betts *v.* De Vitre, 34 L. J. Ch. 289; Penn *v.* Jack, 5 Eq. 81; United Co. *v.* Walker, 56 L. T. Rep. 508; United Co. *v.* Stewart, 13 App. Cas. 401; American Co. *v.* Thomson, 44 Ch. Div. 274; Pneumatic Co. *v.* Puncture Co., 16 Pat. Rep. 299; Br. Syndicate *v.* Taylor, 82 L. T. Rep. 106.

(The plaintiff, however, must elect between damages and an account of profits.) Needham *v.* Oxley, 11 W. R. 852 (court gave an account because plaintiff did not apply seasonably for damages); Neilson *v.* Betts, L. R. 5 H. L. 1; De Vitre *v.* Betts, L. R. 6 H. L. 319; Watson *v.* Holliday, 20 Ch. D. 780; United Co. *v.* Stewart, 13 App. Cas. 401, 412; American Co. *v.* Thomson, 44 Ch. Div. 274; Siddell *v.* Vickers, 9 Pat. R. 152.

But a plaintiff may have an account against one infringer, e. g. a manufacturer, and damages against another, e. g., a user. Penn *v.* Bibby, L. R. 3 Eq. 308. — Ed.

[4] 6 How. 11, 13.

[5] The court here cited extracts from the opinions in Bishop *v.* Knight, 1 P. Wms. 406; Lansdowne *v.* Lansdowne, 1 Madd. 116; Phillips *v.* Homfray, 24 Ch. Div. 439; Sayles *v.* R. R. Co., 4 Ban. & A. 239; Stone Cutter Co. *v.* Sheldon, 15 Fed. 608; Jones *v.* Van Zandt, 4 McL. 599 and May *v.* Logan Co., 30 Fed. 250. — Ed.

its material reflex and embodiment." Smith *v.* Nichols.[1] A patent is an incorporeal property right in an invention, created by statute. Property rights, whether corporeal or incorporeal, are governed by the same principles, and should receive equal protection. When a person wrongfully appropriates a patented invention, it is an invasion of the patentee's right of property, and the gains or profits derived from such piracy belong to the patentee. Because the machine in which the wrongdoer may have embodied his piracy may not belong to the patentee does not affect the real character of the act. I can see no difference in principle between a suit by the owner of a patent against an infringer to recover the profits he has made and a suit by the owner of land or of a mine against a wrongdoer to recover the value of timber or ore taken. I cannot assent to the proposition that the profits actually made by an infringer, for which recovery is sought by a bill in equity, are the same as damages in an action of libel, slander, diversion of a water course, trespass in breaking up meadow or pasture land, and similar actions of tort. The former are the actual, direct, pecuniary benefits, capable of definite measurement, acquired by the wrongdoer; the latter are primarily the loss suffered by the injured party where the wrongdoer realizes no pecuniary benefits, or only such as are indirect, indefinite, or rest in speculation, compromise, or arbitrary adjustment. For these reasons I am of opinion that this cause of action survives, and that the motion to dismiss should be denied.

Motion denied.[2]

[1] 21 Wall. 112, 118.

[2] Smith *v.* Baker, 1 Ban. & A. 117; Atterbury *v.* Gill, 3 Ban. & A. 174; Kirk *v.* Dubois, 28 Fed. 460; Hohorst *v.* Howard, 37 Fed. 97; Griswold *v.* Hilton, 87 Fed. 256 *Accord.*

Draper *v.* Hudson, Holmes 208 (*semble*) *Contra.*

Surrender or Destruction of Infringing Articles. — Besides an injunction and an account of profits, or damages, a plaintiff may have the infringing articles delivered up to be destroyed. Betts *v.* De Vitre, 34 L. J. Ch. 289, 291; Frearson *v.* Loe, 9 Ch. D. 48 (compare Needham *v.* Oxley, 11 W. R. 852, parts of an infringing combination, capable of being used properly in other ways not ordered to be destroyed); Birdsell *v.* Shaliol, 112 U. S. 485, 487 (*semble*); American Co. *v.* Kitsell, 35 Fed. 521, 523–4 (*semble* — but see *contra* Chapman *v.* Ferry, 12 Fed. 693). In England in some cases the court has compelled the surrender of the infringing articles to the plaintiff without providing for their destruction. Tangye *v.* Stott, 14 W. R. 386; Isaacs *v.* Fiddleman, 42 L. T. Rep. 395; United Co. *v.* Walker, 56 L. T. Rep. 508; Cooper *v.* Whittingham, 15 Ch. D. 501; Edison Co. *v.* Smith, 11 Rep. Pat. Cas. 389. But in the United States such compulsory surrender is regarded as the enforcement of penalty and therefore not admissible in equity without the aid of a statute. Stevens *v.* Gladding, 17 How. 447; Callaghan *v.* Myers, 128 U. S. 617. — Ed.

SECTION V. (*continued*).

(*b*) COPYRIGHT.

ANONYMOUS.

BEFORE LORD KING, K., JANUARY 18, 1682.

[1 *Vernon*, 120.]

UPON a motion for an injunction to stop the sale of English Bibles printed beyond sea, it was urged, that the chancery was a court of state, and therefore for the great mischief that might arise from these bibles, if they should be suffered to be publicly sold, the sale ought to be prohibited by this court, upon that politic account, as well as to quiet the king's patentees in their possession.

LORD KEEPER. I do not apprehend the chancery to be in the least a court of state: neither can I grant an injunction in any case, but where a man has a plain right to be quieted in it: and, though the patent for law books has been adjudged good in the House of Lords, yet that is not exactly the same case with this, though near it.

Let there be a trial at law, and let the king's patentees be plaintiffs, and the defendants admit they have sold twelve bibles. And when the trial is over, come back again.[1]

BELL *v.* WALKER AND DEBRETT.

BEFORE SIR LLOYD KENYON, M. R., JUNE 15, 1785.

[1 *Brown, Chancery*, 451.]

MR. PIGOT moved for an injunction to restrain the defendants from publishing a book entitled, "Memoirs of the Life of Mrs. Bellamy:"

[1] Two years later Lord King refused to grant a temporary injunction in the similar case, Hills *v.* University of Oxford, 1 Vern. 275, saying: "In case the right should be found with them [the defendants] they would by such prohibition receive a prejudice, that he could not compensate nor make good to them." See to the same effect E. I. Co. *v.* Sandys, 1 Vern. 127; Baskett *v.* Cunningham, 2 Ed. 137.

A preliminary injunction was granted against the printing of law books, because it was an affair of the state, in Company of Stationers' Case, (1681) 2 Ch. Ca. 76, 2 Show. 258 s. c. The pleadings are given in 2 Ch. Ca. 66, Cart. 89. See also as to subsequent proceedings against third persons, 2 Ch. Ca. 93. In Bathurst *v.* Kearsley, 13 Ves. 504, cited, and Gurney *v.* Longman, 13 Ves. 493, temporary injunctions were issued against the infringement of the plaintiff's exclusive right, granted to him by the House of Lords, of printing an account of certain trials. In the similar case of Manley *v.* Owen, 4 Burr. 2329, cited, 13 Ves. 502, cited, s. c., a permanent injunction was granted. — ED.

which the bill stated to be pirated from a book called, "An Apology for the Life of George-Ann Bellamy." Affidavits were produced, of Mrs. Bellamy being the author of this latter work, and that she had sold the property of the copy to the plaintiff, who had printed it in five volumes, which sold for 15*s.* The book against which the injunction was prayed was in one volume, and sold for 2*s.* 6*d.* Passages were read from each, to show that the facts, and even the terms in which they were related in this, were taken frequently *verbatim* from the original work. His honor said, if this was a fair *bona fide* abridgment of the larger work, several cases, in this court, had decided that an injunction should not be granted. It had been so determined with respect to Dr. Hawkesworth's Voyages. He should not at present decide whether it was such, or a piracy from the former; but he had heard sufficient read to entitle the plaintiff to an injunction, until answer and further order.[1]

Motion granted.

[1] Temporary injunctions against the infringement of plaintiff's copyright were granted in the following cases: Naplock *v.* Curl, 2 Bro. P. C. (Toml. Ed.) 137 cited; Tonson *v.* Clifton, 2 Bro. P. C. (Toml. Ed.) 138 cited; Gulliver *v.* Watson, 2 Bro. P. C. (Toml. Ed.) 138 cited; Ballex *v.* Watson, 2 Bro. P. C. (Toml. Ed.) 138 cited; Read *v.* Hodges, 3 Sw. 679 cited, 2 Atk. 142 cited, Barnard. Ch. 369 cited s. c.; Gyles *v.* Wilcox, 2 Atk. 141, 3 Atk. 269, Barnard. Ch. 368, 370 s. c. (*semble* — no infringement); Tonson *v.* Walker, 3 Sw. 672, 4 Burr. 2325 cited s. c.; Tonson *v.* Mitchell, 2 Bro. P. C. (Toml. Ed.) 138 cited; Baskett *v.* Parsons, 6 Ves. 699, 708 cited; Jeffery *v.* Bowles, 1 Dick. 429; Carran *v.* Bowles, 2 Bro. C. C. 80, 1 Cox, Eq. 283 s. c.; —— *v.* Leadbetter, 4 Ves. 681; Butterworth *v.* Robinson, 5 Ves. 709; Univ. of Oxford *v.* Richardson, 6 Ves. 689; Matthewson *v.* Stockdale, 12 Ves. 270; Wyatt *v.* Barnard, 3 V. & B. 77; Whittingham *v.* Wooler, 2 Sw. 428; Morris *v.* Kelly, 1 Jac. & W. 481; Barfield *v.* Nicholson, 2 S. & S. 1; Sweet *v.* Shaw, 8 L. J. N. S. Ch. 216, 3 Jur. 217 s. c.; Lewis *v.* Fullarton, 2 Beav. 6, 10; Kelly *v.* Hooper, 4 Jur. 21; Campbell *v.* Scott, 11 Sim. 31; Sweet *v.* Cator, 11 Sim. 572; Bishop *v.* Griffin, 16 Sim. 190; Dickens *v.* Lee, 8 Jur. 183; Bohn *v.* Bogue, 10 Jur. 420; Stevens *v.* Wildy, 19 L. J. Ch. 190; Ollendorf *v.* Black, 4 De G. & Sm. 209; Buxton *v.* James, 5 De G. & Sm. 80; Bogue *v.* Houlston, 5 De G. & Sm. 267; Harrold *v.* Houlston, 3 K. & J. 708; Macrae *v.* Holdsworth, 2 De G. & Sm. 496; Norton *v.* Nicholls, 6 W. R. 764; Ingram *v.* Stiff, 5 Jur. N. S. 947; Reade *v.* Lacy, 1 J. & H. 524; Hotten *v.* Arthur, 1 Hem. & M. 603; Smith *v.* Johnson, 33 L. J. Ch. 137; Low *v.* Routledge, 1 Ch. Ap. 42; Kelly *v.* Morris, L. R. 1 Eq. 697; Scott *v.* Stanford, L. R. 3 Eq. 718; Low *v.* Ward, 6 Eq. 415; Maxwell *v.* Somerton, 30 L. T. Rep. 11; Smith *v.* Chatto, 31 L. T. Rep. 775; Little *v.* Gould, 2 Blatchf. 165; Daly *v.* Palmer, 6 Blatchf. 256; Banks *v.* McDivitt, 13 Blatchf. 163; Shook *v.* Rankin, 6 Biss. 477; Reed *v.* Holliday, 19 Fed. 325 (not necessary to prove damage); Farmer *v.* Elstner, 33 Fed. 494; Egbert *v.* Greenberg, 100 Fed. 447.

In Ollendorf *v.* Black, *supra*, Knight Bruce, V. C., said, p. 210, "It has been said here, that the legal right is doubtful; and that the mere existence of the doubt is sufficient to prevent the court from granting the injunction. In that I do not agree. I believe that such a doctrine is new in this court, and would interfere theoretically and practically with its jurisdiction, daily exercised, to a very great extent. The circumstances of the legal right being in doubt, is a matter for serious attention; but does not render it incumbent on the court to refuse an injunction. The court must be guided by a discretion according to the exigencies and the nature of each particular controversy."

In Millar *v.* Taylor, 4 Burr. 2400, Lord Mansfield said that equity never granted a temporary injunction if the right was doubtful. But in 1774 Lord Camden said, 1 Evans, Decisions of Lord Mansfield, 401: "Lord Northington granted them on the idea of a doubtful title; I continued the practice on the same foundation, and so did the present Lord Chancellor [Lord Apsley]." See also per Lord C. J. De Grey, 1 Evans Dec. 393, to same effect. But see per Lord Eldon, in Walcot *v.* Walker, 7 Ves. 1. In the United States an injunction has been granted although the plaintiff's title was doubtful. Pierpont *v.* Ford, 2 Woodb. & M. 23. — Ed.

McNEILL *v.* WILLIAMS.

Before Sir J. L. Knight Bruce, V. C., January 22, 1847.

[11 *Jurist*, 345.]

The motion for an injunction in this case was heard on the 14th and 21st December, 1846, and was now renewed. The motion was to restrain John Williams and W. E. Rust, publishers, and M. E. G. Hughes and W. J. Hughes, from selling or disposing of a book, entitled "Comprehensive Tables for the Calculation of Earthwork as connected with Railways, Canals, Docks, Harbours, &c.," being the work published by John Williams and Co., and to restrain them from printing, publishing, selling, or disposing of any other book, publication, or work containing any calculations, arithmetical results, or figures copied or taken from the work of Sir J. McNeill, the plaintiff, entitled "Tables for calculating the Cubic Quantity of Earthwork in the Cuttings and Embankments of Canals, Railways, and Turnpike-roads."[1]

Knight Bruce, V. C.: Will the defendants' counsel consent, in case it shall be established that there has been an invasion of Sir John McNeill's copyright, that the damages shall be ascertained in this court, and are they willing to facilitate legal proceedings?

Teed, on behalf of the defendants, assented.

Knight Bruce, V. C.: Of late years the tendency or inclination of the court of chancery has, I think, been, and properly been, rather to restrict and to diminish, than to extend and increase, the class or number of cases in which it interferes by injunction in cases of contested copyright before the establishment of the legal title: the court has, of late years especially, given great weight to the consideration of the question, which of the two parties to the dispute is more likely to suffer by an erroneous or hasty judgment of an interlocutory nature against them; and to the consideration also of the very possible, if not probable, effect which an injunction may have to the defendants' prejudice in an action. I agree that there ought to be none. I have in this case to weigh, on the one hand, the suspicious nature of the defendants' [plaintiff's?] case, for suspicious, I confess, upon the present materials, it appears to me to be, and the probable mischief from not interfering at present in his favor, if he should ultimately prove to be right; and, on the other hand, the possibility — the rational possibility — for I am unable to bring myself to deny the rational possibility — that the plaintiff may be right. I have also to consider the mischief generally that may be done by interfering in this stage of the cause if the defendants shall ultimately appear to be right; including particularly the possible prejudice which may be created against them in an action by the existence of an injunction. Upon

[1] The arguments of counsel are omitted. — Ed.

the whole, I think the ends of justice in this case will be better answered by abstaining from granting the injunction at present; the defendants continuing to keep the account which they have already undertaken to continue, and giving that undertaking which the defendants' counsel have consented to give with respect to damages, in case the infringement is proved and the plaintiff's title is established, and facilitating proceedings at law in any reasonable way the plaintiff in equity may require. The motion may stand over, with leave to the plaintiff to bring such action as he may be advised, the action to be brought only against the defendants Messrs. Williams & Rust, the booksellers.[1]

[1] Temporary injunctions were refused in the following cases: Walcot *v.* Walker, 7 V s. 1; Wilkins *v.* Aikin, 17 Ves. 422; Lawrence *v.* Smith, Jac. 471 (doubtful if matter was impious); Murray *v.* Benton, Jac. 474 n. (a) (like preceding case); Lowndes *v.* Duncombe, 1 L. J. Ch. 51; Mawman *v.* Tegg, 2 Russ. 385; Bramwell *v.* Halcomb, 3 My. & Cr. 737; Chappell *v.* Purdy, 4 Y. & C. 485; Spottiswoode *v.* Clarke, 2 Ph. 154; Margetson *v.* Wright, 2 De G. & Sm. 420; Cassell *v.* Stiff, 2 K. & J. 279; Morris *v.* Wright, 5 Ch. 279; Ward *v.* Scott (W. N. 1886), 190; Blunt *v.* Patten, 2 Paine C. C. 397 (infringement doubtful); Miller *v.* McElroy, Fed. Cas. No. 9581, 1 Am. L. Reg. 198 s. c.; Lawrence *v.* Dana, 4 Cliff. 1; Jollie *v.* Jaques, 1 Blatchf. 618; Baker *v.* Taylor, 2 Blatchf. 82; Scribner *v.* Stoddart, Fed. Cas. No. 12,561, 8 W. N. C. (Pa.) 61 s. c.; Hubbard *v.* Thompson, 14 Fed. 689; Humphreys Co. *v.* Armstrong, 30 Fed. 66; Hanson *v.* Jaccard Co., 32 Fed. 202; Lamb *v.* Grand Rapids Co., 39 Fed. 474; Worthington *v.* Batty, 40 Fed. 479; West Co. *v.* Lawyers Co., 53 Fed. 265; American Assn. *v.* Gocher, 70 Fed. 237.

Delay. — The plaintiff forfeited his right to a temporary injunction by delay in bringing his suit in Platt *v.* Button, 19 Ves. 447; Rundell *v.* Murray, Jac. 311; Saunders *v.* Smith, 3 My. & Cr. 711; Lewis *v.* Chapman, 3 Beav. 133.

Mischievous writings. — No injunction temporary or permanent is allowed in favor of one claiming a copyright in a book of a pernicious nature. Walcot *v.* Walker, 7 Ves. 1; Southey *v.* Sherwood, 2 Mer. 435; Burnell *v.* Chetwood, 2 Mer. 441.

Permanent injunctions against infringement of copyright were granted in the following cases: Ballex *v.* Watson, 2 Bro. P. C. (Toml. Ed.) 138, 1 W. Bl. 305, cited, s. c.; Pinnock *v.* Rose, 2 Bro. C. C. 85, n. (*semble*); Longman *v.* Winchester, 16 Ves. 269; Tinsley *v.* Lacy, 1 H. & M. 747 (not necessary to establish any damages); Kelly *v.* Morris, L. R. 1 Eq. 697; Morris *v.* Ashbee, 7 Eq. 34; Cobbett *v.* Woodward, 18 Eq. 444 (not necessary to establish damages); Ager *v.* Peninsular Co., 26 Ch. D. 637; Warne *v.* Seebohm, 39 Ch. D. 73; Exchange Co. *v.* Gregory, [1896] 1 Q. B. 147; Cochrane *v.* Deener, 94 U. S. 780 (*semble*); Morse *v.* Reed, Fed. Cas. No. 9860; Whitney *v.* Fort, Fed. Cas. No. 17,588, 2 Fish. Pat. Cas. 657, cited; Gray *v.* Russell, 1 Story, 11; Folsom *v.* Marsh, 2 Story, 100; Wallace *v.* Goodyear, 2 Wall. Jr. 283; Fishel *v.* Lueckel, 53 Fed. 499 (not necessary to establish damages); Black *v.* Allen Co., 56 Fed. 764 (like preceding case); Williamson *v.* Musgrove, 1 N. Zeal. Gaz. L. R. 269; Cadell *v.* Robertson, 5 Pat. Ap. (Scotch) 493.

In the following cases permanent injunctions were refused: Dodsley *v.* Kinnersley, Amb. 403; Whittingham *v.* Wooler, 2 Sw. 428; Spiers *v.* Brown, 6 W. R. 352; Norton *v.* Nicholls, 6 W. R. 764 (because right not established at law); Pierce *v.* Worth, 18 L. T. Rep. 710; Pike *v.* Nicholas, 5 Ch. 251; Dunlop Co. *v.* Moseley, 20 T. L. R. 85; Webb *v.* Powers, 2 Woodb. & M. 497.

No injunction in equity if no action at law. The jurisdiction in equity in case of copyright is concurrent. If there is no tort at law, there is no injunction in equity. Walcot *v.* Walker, 7 Ves. 1; Lawrence *v.* Smith, Jac. 471; Murray *v.* Benbow, Jac. 474, n.; Southey *v.* Sherwood, 2 Mer. 435; Byron *v.* Dugdale, 1 L. J. Ch. 239; Seeley *v.* Fisher, 11 Sim. 581; Clark *v.* Freeman, 11 Beav. 112; Martinetti *v.* Maguire, 1 Deady, 216, 1 Abb. C. C. 356 s. c. — Ed.

BAILY *v.* TAYLOR.

BEFORE SIR JOHN LEACH, M. R., DECEMBER 11, 1829.

[1 *Russell & Mylne*, 73.[1]]

IN 1824, the plaintiff filed his bill for an injunction to restrain the defendant from publishing the second and third editions of a work, in which he had copied thirteen tables of calculations as to the value of leases and annuities, which had been published by the plaintiff in three works — one printed in 1802, and another in 1808, and the third in 1810: and the bill also prayed an account.

The first edition of the defendant's work was published in 1811; and the plaintiff admitted that he had licensed that edition, on condition that the defendant acknowledged in his preface that he had copied some of his tables from the plaintiff's works. The defendant published a second edition in 1820, and a third edition in 1823.

In December, 1824, soon after the filing of the bill, the plaintiff moved before the Master of the Rolls, who was then Vice-Chancellor, for an injunction to restrain the publication of the defendant's work. The motion was refused, upon the ground that the tables complained of as pirated formed a very inconsiderable part of the plaintiff's work, and could be calculated by any competent person in a few hours; and also on the ground of the length of time which had elapsed since the publication of the second edition of the defendant's book.

Notwithstanding the refusal of the injunction, the plaintiff proceeded with his cause, and brought it on to a hearing.[2]

THE MASTER OF THE ROLLS.

This court has no jurisdiction to give to a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and in such case, the court will also give him an account, that his remedy here may be complete.[3] If this court do not interfere by injunction, then his

[1] Taml. 295 s. c. — ED. [2] The arguments of counsel are omitted. — ED.

[3] Universities *v.* Richardson, 6 Ves. 689, 705 (*semble*); Hogg *v.* Kirby, 8 Ves. 215, 223 (*semble*); Grierson *v.* Eyre, 9 Ves. 341, 347 (*semble*); Kelly *v.* Hooper, 1 Y. & C. 197; Colburn *v.* Simms, 2 Hare, 554; Delfe *v.* Delamotte, 3 K. & J. 581; Kelly *v.* Hodge, 29 L. T. Rep. 387; Pike *v.* Nicholas, 5 Ch. 251; Stevens *v.* Gladding, 17 How. 447; Stevens *v.* Gladding, 2 Curt. C. C. 608 (commissions on sales are profits within the rule); Callaghan *v.* Myers, 128 U. S. 617; Gilmore *v.* Anderson, 38 Fed. 846; Fishel *v.* Lueckel, 53 Fed. 499 *Accord*.

INJUNCTION AND DAMAGES. — In England, under the Chancery Amendment Act, 1858, a plaintiff, entitled to an injunction, may recover in the same suit damages, as distinguished from an account of profits. Ager *v.* Peninsular Co., 26 Ch. D. 637.

But in this country, there being no statute in the case of copyright, as there is in regard to patent rights, giving damages in equity, a plaintiff must recover damages by an action at law. Chapman *v.* Ferry, 12 Fed. 693; Social Ass'n *v.* Murphy, 129 Fed. 148.

SURRENDER AND DESTRUCTION OF INFRINGING ARTICLES. — If the right to an injunction is established, the court will order books or other articles infringing the plaintiff's copyright to be surrendered for destruction. Delp *v.* Delamotte, 3 K. & J. 581; Kelly *v.* Hodge, 29 L. T. Rep. 387, 1 Set. Decrees (5 Ed.) 572 s. c.; Hole *v.* Bradbury, 12 Ch. D. 886

remedy, as in the case of any other injury to his property, must be at law.[1]

I agree, that, although the plaintiff failed, upon the answer of the defendant, to obtain an injunction, he is at liberty to claim it at the hearing. The question, then, is, Whether the court ought to grant an injunction as the case now appears? Considering the very inconsiderable part of the defendant's work which is complained of, and that this may be calculated in a few hours, so as to give the defendant an unquestionable right to its republication; and considering the difficulty, which would be imposed upon the Master, if an account were directed, of ascertaining what part of the defendant's profit ought to be attributed to the plaintiff's tables; and considering also the distance of time at which the injunction is now sought, being nine years after the publication of the defendant's second edition, I am bound to refuse the injunction, and to leave the plaintiff to seek his remedy at law; and the injunction being refused, there can be no account. The bill must, therefore, be dismissed, and with costs.[2]

HOGG *v.* SCOTT.

Before Sir Charles Hall, V. C., May 1, 1874.

[*Law Reports*, 18 *Equity Cases*, 444.]

John Scott, the defendant, in 1868 wrote and published a work entitled the Orchardist, or a Cultural and Descriptive Catalogue of Fruit Trees grown for sale by John Scott, Merriott Nurseries, Crewkerne, Somersetshire. He had in such work copied to a very great extent, frequently *verbatim*, and at other times with slight or merely colorable alterations, from the plaintiff's Fruit Manual, and in particular from the third edition of that book and from other books of the plaintiff. The plaintiff wrote to the defendant for, and on the 6th of October, 1869, received, a copy of the Orchardist, and at page 9 of that work he read the remarks in reference to the Pommier de Paradis, and to the editors of the Journal of Horticulture, but he did not further examine the work. On the 6th of October, 1869, the plaintiff wrote to the defendant thanking him for the copy of the Orchardist, and stated that he had only just looked into the Orchardist, for he had only got it that morning; that the defendant's collection appeared

(*semble*); Warne *v.* Seebohm, 39 Ch. D. 73 (cancellation of infringing portions); Drury *v.* Ewing, 1 Bond, 540. See the analogous cases, Prince Albert *v.* Strange, 2 De G. & Sm. 652, and Emperor *v.* Day, 3 D. F. & J. 217.

The court should not decree the surrender of infringing books and the like to the plaintiff for his own use. Hole *v.* Bradbury, 12 Ch. D. 886 (criticising Delp *v.* Delamotte, 3 K. & J. 581, and Stannard *v.* Harrison, 19 W. R. 811); 1 Dan. Ch. Pr. (7 Ed.) 1214 n. b. But in Isaacs *v.* Fiddeman, 42 L. T. Rep. 395, Jessel, M. R., declined to follow Hole *v.* Bradbury, *supra*. See also Pitman *v.* Hine, 1 T. L. R. 39. — Ed.

[1] Monk *v.* Harper, 3 Edw. 109. — Ed.

[2] Cox *v.* Land Co., 7 Eq. 324 *Accord.* — Ed.

to be a very rich one; and that he wished he had an opportunity of paying him a visit.

The defendant at the end of 1872 commenced the publication, in parts, of "Scott's Orchardist, or Catalogue of Fruits cultivated at Merriott, Somerset, 2d edition." There were six numbers — one in each month, October and November, two in December, 1872, and one in each month, March and April, 1873 — and on their completion he published them in a volume for 7*s.* 6*d.* In this edition the defendant had republished the piracies contained in the first edition of the Orchardist. The plaintiff did not read or see any of the six numbers of the second edition of the Orchardist, and it was not until after the publication of the second edition complete that he discovered that the defendant had extensively copied or pirated from his books. The bill was filed August 2, 1873, for an injunction to restrain the defendant from printing or selling any copy of the Orchardist containing piracies from the plaintiff's books, for damages and accounts.[1]

Sir Charles Hall, V. C., on the question of acquiescence, said: It does not, in the view which I take of this case, appear to me to be necessary to say what is the true conclusion or the legal inference to be drawn in reference to the knowledge of the plaintiff of the contents of the book, more or less, from the time when he received a copy of it. Assuming that he must be taken as from the time when he received a copy to have been fully aware of the contents, I still think that that circumstance is not sufficient to deprive him of the relief which he seeks in this suit. The position of things, assuming that he had knowledge at that time, appears to me to be this: The plaintiff was at the time he received the copy of the book, which is relied upon as having given him knowledge of its contents, the undoubted legal owner of the copyright, the piracy of which is complained of. That was his property, and he had a right to say to the defendant, "That is my property, and I will neither allow you to make nor recognize your making use of it." The plaintiff did not take any step founded on his right to property until he filed his bill. He did file his bill soon after he received a copy of the second edition; but assuming the most in the defendant's favor, all that had taken place in the mean time, beyond the letter which was sent to him, was the acquisition by the plaintiff of knowledge that the defendant was going on publishing the Orchardist for two years afterwards, and that the plaintiff knew in October, 1872, that the defendant was about to publish a new edition of his book, which was to be much larger and more expensive.

Now up to the time of his knowledge of the new edition, in October, 1872, the plaintiff was aware only that the defendant was going on selling copies of the Orchardist. When he became aware of the defendant's intended new edition, there was nothing at all events to induce him to suppose or believe that there would be any new matter introduced into it, taken from the plaintiff's work. The matter stood,

[1] The statement of the case is abridged, and only so much of the judgment as relates to laches and acquiescence is given. — Ed.

so far as the plaintiff was concerned, exactly as it did before. I have first of all to consider whether not taking any proceeding with reference to the old matter in any given time would deprive the plaintiff, on the ground of acquiescence, of the right to come to this court. The omission to take any proceedings at law or in equity for a time does not in itself appear to me an encouragement to the defendant amounting to an equitable bar in this court. It is not enough to show that the legal right is not to be protected here. It must not be assumed that the court is satisfied that the plaintiff by his conduct has led the defendant to incur material expenses in reference to his new book. Assuming that the plaintiff has a legal right of action against the defendant under the sections referred to, what are the authorities upon which it may be said that his conduct in abstaining from making a claim, and in allowing the defendant to go on selling his book, has taken that right away? In Gerrard *v.* O'Reilly,[1] Lord St. Leonards said: "It must not be understood that this court will on light grounds act against the legal rights of parties in cases like the present. There must be fraud or such acquiescence as in the view of this court would make it a fraud afterwards to insist upon the legal right. The case of Maher *v.* Foundling Hospital [2] was a very hard case, and it was strenuously argued at the bar, yet Lord Eldon denied the relief generally. This shows that it requires a very strong case to induce this court to deprive a man of his right at law to prevent a particular act from being done, or his right to receive damages if it be done. No act has been shown in this case amounting to such acquiescence; on the second ground, therefore, the bill cannot be sustained." I have been referred to what was said by Lord Justice Turner in Johnson *v.* Wyatt.[3] He said: "That there was sufficient acquiescence to justify the court in refusing to grant the injunction upon an interlocutory application, cannot, I think, be doubted; but I apprehend that to justify the court in refusing to interfere at the hearing of a cause, there must be a much stronger case of acquiescence than is required upon an interlocutory application, for at the hearing of a cause it is the duty of the court to decide upon the rights of the parties, and the dismissal of the bill upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and forever lost."

The same point was dealt with by Lord Cottenham in the Duke of Leeds *v.* Earl of Amherst.[4] His Lordship said (2 Ph. 123): "Now acquiescence is not the term which ought to be used. If a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence. In that sense, however, there is no acquiescence here, for the act was done when the present duke was a minor, and when, if he had knowledge or means of knowledge — and he does not appear to have been of age for that — nothing of acquiescence can be imputed to him. The defence, therefore, which is

[1] 3 D. & War. 414, 433. [2] 1 V. & B. 188. [3] 2 D. J. & S. 18, 25. [4] 2 Ph. 117.

really intended to be set up, is not acquiescence, but release or abandonment of the party's right. For that purpose, however, it is not only necessary to show that the plaintiff knew of the acts of waste having been committed, but that he knew of the rights which they gave him against his father, and that having such knowledge, he did some act amounting to a release of that right." Now in this case knowledge by the plaintiff that the defendant was advertising his work, which contained the objectionable matter, and that he was going on selling it, does not appear to me to amount to that description of acquiescence in the defendant's dealing with the subject-matter which must be taken to deprive the plaintiff of the interference of this court as from any given time. I am satisfied that his legal right remained, and to have tried the question at law for damages, would under all the circumstances, have been an unsatisfactory thing to do. Then the question arises, whether the case is altered by the fact that the plaintiff knew — and I must take it that he knew — that the defendant was about to issue a new edition of his book. Am I to assume against the plaintiff that he knew what the contents of the new book would be, whether of the old matter, as in the first edition, or not? or am I to consider that it was incumbent upon him to inquire from the defendant all the circumstances — whether he was going to put in the new edition what he was at that moment illegally retaining in the old one? Considering the time when the advertisement came out, and the character of that advertisement, and the fact that the plaintiff was one of the editors of the Horticultural Journal, that does not to my mind make it a sufficiently strong case of encouragement or acquiescence on the part of the plaintiff to justify me in saying that this court will withhold the relief which he would otherwise be entitled to, leaving him with his undoubted legal right to proceed in a court of law in respect of the same matter; that is to say, that the court having determined the legal question in his favor, should send him to a court of law to get damages, and refuse an injunction. Under such circumstances, to do so would be playing with justice and the forms of procedure. I have, therefore, come to the conclusion that the plaintiff's right in this court has not been taken away by what has occurred.[1]

[1] The evidence of acquiescence being insufficient, injunctions were granted in the following cases of infringement of copyright: —

Permanent injunctions. — Pitman *v.* Hine, 1 T. L. R. 39; Norris *v.* Ashbee, 7 Eq. 34; Weldon *v.* Dicks, 10 Ch. D. 247; Greene *v.* Bishop, 1 Cliff. 186, 202; Gilmore *v.* Anderson, 38 Fed. 846.

Temporary injunctions. — Newman *v.* Tegg, 2 Russ. 385, 393; Buxton *v.* James, 5 De G. & Sm. 80.

In the following cases because of the plaintiff's acquiescence injunctions were denied: —

Permanent injunctions. — McLaughlin *v.* People's Co., 21 Fed. 574.

Temporary injunctions. — Rundell *v.* Murray, Jac. 311; Southey *v.* Sherwood, 2 Mer. 435; Saunders *v.* Smith, 3 My. & Cr. 711; Heine *v.* Appleton, 4 Blatchf. 125. — Ed.

UNPUBLISHED WORKS. — The author of unpublished writings may obtain an injunction against their printing by others.

Temporary injunctions. — Queensberry *v.* Shebbeare, 2 Eden, 329; Prince Albert *v.* Strange, 1 Mac. & G. 25; Bartlett *v.* Crittenden, Fed. Cas. No. 1082.

Permanent injunctions. — Burnett *v.* Chetwynd, 2 Mer. 440; Webb *v.* Rose, 3 Sw. 674, cited, 2 Bro. P. C. (Toml. ed.) 138, cited, s. c.; Forrester *v.* Waller, 3 Sw. 674, cited, 2 Bro. P. C. (Toml. ed.) 138, cited, 4 Burr. 2331, cited, s. c.; Macklin *v.* Richardson, Amb. 694, 2 Bro. P. C. (Toml. ed.) 138, s. c.; Bartlett *v.* Crittenden, 5 McL. 32; Palmer *v.* De Witt, 47 N. Y. 532; Monk *v.* Harper, 3 Edw. 109 (*semble*).

UNPUBLISHED DRAMAS — REPRESENTATION. — The author of an unpublished play or musical composition may obtain an injunction against its representation.

Temporary injunctions. — Morris *v.* Kelly, 1 J. & W. 481; Crowe *v.* Aiken, 2 Biss. 208; Thomas *v.* Lennon, 14 Fed. 849; Goldmark *v.* Kreling, 25 Fed. 349; Jones *v.* Thorne, 1 N. Y. Leg. Obs. 408; French *v.* Kreling, 63 Fed. 621; Shook *v.* Daly, 49 How. Pr. 366; French *v.* Maguire, 55 How. Pr. 471; French *v.* Connelly, 1 N. Y. W. Dig. 196; Widmer *v.* Greene, 56 How. Pr. 91; Fleron *v.* Lackaye, 14 N. Y. Sup. 292.

Permanent injunctions. — Keene *v.* Wheatley, Fed. Cas. No. 7644, 4 Phila. 157, 9 Am. L. Reg. 33 s. c.; Tompkins *v.* Halleck, 133 Mass. 32 (overruling Keene *v.* Kimball, 16 Gray, 545).

PRIVATE LETTERS. — The writer of a letter retains such an interest in it as to entitle him to an injunction against its publication by the recipient.

Temporary injunctions. — Pope *v.* Curl 2 Atk. 34; Thompson *v.* Stanhope, Amb. 737 (Lord Chesterfield's letters); Gee *v.* Pritchard, 2 Sw. 402; Palin *v.* Gathercole, 1 Coll 565; Andrew *v.* Raeburn, 9 Ch. 522; Denis *v.* LeClerc, 1 Mart. La. 297; Woolsey *v.* Judd, 4 Duer, 379 (declining to follow Hoyt *v.* McKenzie, 3 Barb. Ch. 320; and Wetmore *v.* Scovell, 3 Edw. 515).

Permanent injunctions. — Lytton *v.* Devey, 54 L. J. Ch. 293; Labouchere *v.* Hess, 77 L. T. Rep. 559; Folsom *v.* Marsh, 2 Story, C. C. 100 (*semble*); Grigsby *v.* Breckenridge, 2 Bush, 484 (recipient about to die may give the letters to her daughter); Dock *v.* Dock, 180 Pa. 14. The right to an injunction by the writer of letters against their publication by the recipient is recognized extrajudicially in many other cases. Boosey *v.* Jefferys, 6 Ex. 580, 583, per Lord Campbell; Howard *v.* Gunn, 32 Beav. 462; Hopkinson *v.* Burghley, 2 Ch. Ap. 447 (recipient must produce them at suit of a third person notwithstanding objection of the writer); *Re* Wheatcroft 6 Ch. D. 97 (writer cannot compel surrender of letters by recipient); U. S. *v.* Tanner, 6 McL. 128; Rice *v.* Williams, 32 Fed. 437 (contract of recipient to sell letter is void); Eyre *v.* Higbee, 35 Barb. 502 (administrator of recipient cannot sell the letters as assets); Roberson *v.* Rochester Co., 64 N. Y. Ap. Div. 30, 35, 171 N. Y. 538, 564; Granard *v.* Dunkin, 1 Ba. & Be. 207.

In Percival *v.* Phipps, 2 V. & B. 19, the court refused to restrain the publication of letters by the recipient in self-defense.

LECTURES, ORAL OR WRITTEN. — A lecturer is entitled to an injunction against the publication of his lecture.

Temporary injunctions. — Abernethy *v.* Hutchinson, 1 H. & Tw. 28, 3 L. J. Ch. 209, s. c.; Bartlett *v.* Crittenden, 4 McL. 300, 5 McL. 32, 41.

Permanent injunctions. — Cullen's Case, 12 App. Cas. 332, n. 2; Nichols *v.* Pitman, 26 A. D. 374; Crowe *v.* Aiken, 2 Biss. 208, 214 (sermons); Keene *v.* Kimball, 16 Gray, 545, 551 (*semble*); Tompkins *v.* Halleck, 133 Mass. 32, 44 (*semble*).

NEWS. — Injunctions are granted against the use of the fruits of another's labor in the collection of news.

Temporary injunctions. — Board of Trade *v.* O'Dell Co., 115 Fed. 574 (*semble* — injunction refused because of illegality of greater part of plaintiff's business).

Permanent injunctions. — Exchange Co. *v.* Gregory, [1896] 1 Q. B. 147; Exchange Co. *v.* Central News, [1897] 2 Ch. 48; Board of Trade *v.* Hadden-Kreill Co., 109 Fed. 705.

INJUNCTIONS AFTER EXPIRATION OF COPYRIGHT. — It was supposed for many years that an author's common law right was not extinguished by his statutory copyright, and that upon the expiration of the latter he might restrain the infringement of the former. Temporary injunctions were granted, accordingly, in Eyre *v.* Walker, 2 Bro. P. C. (Toml. ed.) 138, cited, 4 Burr, 2325, cited, Anon. 3 Sw. 675, cited, s. c.; Motte *v.* Falkner, 2 Bro. P. C. (Toml. ed.) 138, cited, 4 Burr. 2325, cited, 3 Sw. 675, cited, s. c.; Walker *v.* Walker, 2 Bro. P. C. (Toml. ed.) 138, cited, 4 Burr. 2325, cited, 3 Sw. 676, cited, s. c.; Tonson *v.* Walker, 4 Burr, 2325, cited, 3 Sw. 676, cited, s. c.; Tonson *v.* Walker, 3 Sw. 672, 4 Burr, 2325, cited.

In Osborne *v.* Donaldson, 2 Eden, 327, however, a temporary injunction was dissolved by Lord Chancellor Northington because the plaintiff's common law right was thought to be so doubtful, and it was definitively settled in Donaldson *v.* Beckett, 2 Bro. P. C. (Toml. ed.) 129, that the author's common law right was extinguished by publication. See, to the same effect, Wheaton *v.* Peters, 8 Pet. 591.

SECTION V. (*continued*).

(*c*) Miscellaneous Exclusive Franchises.

CHURCHMAN *v.* TUNSTAL.

In the Exchequer, Hilary Term, 1659.

[*Hardres*, 162.]

In the Exchequer chamber upon English bill the case was thus, viz.: the plaintiff was a fermor of a common ferry at Branford in Middlesex, at a fee-farm rent; the ferry had been a common ferry time out of mind; and he laid in his bill that no other person ought to erect any other ferry to the prejudice of his; and the defendant being a waterman, who had lands on both sides the river of Thames about three quarters of a mile distant from the plaintiff's ferry, did usually in his boat ferry over passengers, horses, etc., which was prejudicial to the plaintiff's common ferry; wherefore the plaintiff seeks here to suppress the defendant's ferry, and that the defendant may be enjoined by decree of this court to use the plaintiff's ferry; and the plaintiff's counsel insisted that it was usual and frequent in such cases to suppress by decree such nuisances in the king's case, and that of his fermors; as in case of a mill erected to the hindrance of the king's mill; and the like in case of a fair or market, although in those cases a special action upon the case, or a *quo warranto* lies well enough; and in Trin. 21 Jac. lib. decret. fol. 346, Inter Attorney-General and Webster, it was decreed that a beam set up to weigh lead near to the king's beam, within his manor, to the nuisance of the king's beam, should be cut down; and Mich. 29 and 30 Eliz. in this court there was a case betwixt Sir John Cuts and the Mayor and Burgesses of Thackstead in Essex, concerning a fair, which was cited in this case.

A ferry is a franchise, and a flower of the crown, which a private man cannot set up without license: and the case in 22 H. 6. 14, per Paston and Newton is express in point, vide 11 H. 6. 23.

The council of the other side urged that these common ferries were in the nature of monopolies and restraints upon trade; that a common stream is like a common highway, which is free to all; for which reason toll-thorough cannot be claimed by prescription, 22 Ass. 58. That the restraint which the plaintiff would lay upon others is uncertain, and without limits of distance; for by the same reason that the defendant may not use a ferry three quarters of a mile from the plaintiff's ferry; by the same, he may not use one, two, three, or ten or twenty miles off: Nor is this case like to that of a mill; for that a

quo warranto lies not here. That this prescription is in the negative, and not proved as it ought to be; and they cited these cases, viz., 11 H. 4. 47, 13 H. 4. 14, 8 Ed. 3. 304, 8 Rep. 125, 127, Cro. 1 Rep. 132.

And the court was of this opinion, because it came too near a monopoly, and restrained trade, and because no precedent was shown in point. The case of a beam (that had been urged) was of a beam in the king's own manor; and they dismissed the bill, but without costs.

Sed quære de ceo, for contrary to the book of 22 H. 6. and to precedents in like cases in this court, which is the proper court for the revenue, and ought to prevent damage and prejudice that may arise to it.[1]

WHITECHURCH *v.* HIDE.

BEFORE LORD HARDWICKE, C., AUGUST 24, 1742.

[2 *Atkyns*, 391.]

THIS was a bill brought founded on the right of the mayor, commonalty, etc., of the city of London, for supplying the borough of Southwark, and the adjacent places, with water; and by virtue of several mean assignments, the plaintiff is now in possession of this right, exclusive of all others; and prays an injunction against the defendant, to restrain him from incroaching upon this right, by raising engines, laying pipes, and breaking up the ground, etc. and to have it established in this court against the defendant and all others.

The defendant demurs, and for cause of demurrer shows that the plaintiff ought first to have established his right at law.

LORD CHANCELLOR. This bill is brought upon an exceeding unfavorable case, for it is in some measure setting up a monopoly; and such a kind of right as is claimed in no other part of this town, neither by the York-buildings company, or the New-river-head, or even by the city of London itself, in any part of it; nor can any person prescribe to break up streets without an act of parliament.

The supplying the borough of Southwark with water is of great consequence to the public.

Now, it is said, a man may bring a bill, if he has a legal title, to establish his right, without first trying it at law, as in general cases of fisheries in rivers, etc., where there is no general prescription.

The counsel for the plaintiff have cited cases of this kind, and there might have been many more mentioned; as for instance, in the cases of new inventions upon the act, that fixes the sole property of books in the authors, for it is under a common general right upon the statute,

1 "That case [Churchman *v.* Tunstal] is no authority, as there was afterwards a decree in that case by Lord Hale that the new ferry should be put down." Per Parke, B., in Huzzey *v.* Field, 2 C. M. & R. 432, 437. See also the statement by Macdonald, C. B., *supra*, 617. — ED.

so likewise under the act of parliament for vesting the sole property in prints of new invention.

But I apprehend, when these acts were first passed, the court did not immediately grant an injunction, to restrain all other persons till the letters patent had been first established at law.

But, in the present case, it would run to a prodigious expense to enter into a long examination, arising upon consequential and collateral matter, when probably even the very foundation for the plaintiff's right may fail, which would make the expensive proceedings here entirely fruitless, when one trial at law may possibly quiet the question.

As to the objection that the plaintiff may have no remedy at law, there is but little weight in it; for if he has a sole exclusive right, no doubt but he has a remedy; and if any person infringe that right, and he cannot bring a common action of trespass, he may have an action of the case, for the law will not permit a man who has a right to be without a remedy.

As this is a case of great consequence to the public, I would allow the demurrer, even if there were no other reason; but the risk the parties may run, in going into a very large expense, and long examination here, to no purpose, and the chance there is of the plaintiff's right falling to the ground at law, is a very strong reason for it.

The cases cited for the plaintiff were Bush *v.* Western, The Duke of Dorset *v.* Serjeant Girdler,[1] and the Mayor of York *v.* Sir Lionel Pilkington.

For the defendant, in support of the demurrer, were cited the cases of Powlet *v.* Ingres,[2] Reynolds *v.* Hind, May 5, 1729, in the Exchequer.[3]

ANONYMOUS.

Before Lord Hardwicke, June 15, 1750.

[1 *Vesey*, 476.]

Motion on the part of the plaintiff's lessees of the Dean and Chapter of Durham, for an injunction to restrain defendants, certain fishermen, from using ferry boats on the Tyne.

Lord Chancellor. This was moved before; and denied, because the plaintiffs had not shown that they had kept up sufficient ferry-boats. I had other doubts on that motion. It is not of course to come into this court on infringement of a franchise to have an injunction upon filing the bill before answer. The general rule is after the answer: in bills for an injunction to stay waste, the court will grant it before answer, on filing the bill, and showing that waste may be

[1] Prec. Ch. 531. [2] 1 Vern. 308.

[3] Boston Co. *v.* Salem Co., 2 Gray, 1 (exclusive railway franchise) *Contra*. — Ed.

committed, because there cannot be a compensation, and it may be an irreparable mischief. To be sure there may be some cases, as in a matter of account of damages, where the court does it; that is, where the right of the plaintiff appears on record. In cases therefore of a new invention by letters patent, a bill may be filed for infringing that right; and before answer (the right appearing by matter of record) on filing the bill and affidavit it may be granted. So in the case of a book-vending, which by act of parliament if vested in a particular person, though the right not appearing by record of this court, yet being grounded on an act of parliament, that might be a foundation to grant injunction before answer: but otherwise in these special cases you must stay till answer comes in. However as the right of the plaintiffs to the sole use of this ferry appears on record by a decree of Lord Cowper, I thought that the record of this court was a sufficient foundation to grant an injunction before answer: and there have been cases of that kind; where a right has been tried by the parties, that right appearing by record of the court, has been thought a foundation to grant it before answer. But this was a very tender case to interpose to restrain before answer, being of great consequence to the city of London from the coal trade. Therefore as it was not shown that the plaintiffs kept up sufficient ferry-boats to carry passengers, etc., I denied the motion. This has now been endeavored to be shown by affidavit; but the affidavit is not sufficient for that purpose. On the circumstances I will not restrain, and construe it a breach of the privilege. This is like the ferry on the Thames, and passage boats to Gravesend, which have a sole right of carrying, yet other wherries do carry every day; and it is not held an infringement of that right.

ANONYMOUS.

BEFORE LORD HARDWICKE, C., JULY 4, 1752.

[2 *Vesey*, 414.]

MOTION for injunction to stay the use of a market set up by defendant Brown.

LORD CHANCELLOR refused it, saying this was a most extraordinary attempt, of which he never knew an instance before. The plaintiff has several remedies: there may be a *scire facias* in the name of the crown to repeal letters patent granting a market to the prejudice of his market, as being too near thereto; or without the aid of the crown he may have a common action upon the case for the prejudice to his market; whereas the plaintiff comes originally into this court for this injunction. What great confusion would it cause to bring all the persons who use this market into contempt upon the injunction; and to what purpose. If in any case this court ought to interpose, it

would be after the title was established at law; which is not done here, though there are so many means of doing it. Injunctions are granted to quiet in possession, as at the time of filing the bill and three years before: but that is drawn from the equity on the statutes of forcible entries. Upon the equity founded on that statute, where there has been such possession for three years, this court will prevent beforehand: but there is no such statute in this case: it is founded on the common law, which gives the above-mentioned remedies. This court will not interpose before the title at law is established: though I will not say that even then the court will interpose, because of the inconveniences.[1]

CROTON TURNPIKE ROAD CO. *v.* RYDER AND OTHERS.

BEFORE JAMES KENT, ESQ., C., NOVEMBER 21, 1815.

[1 *Johnson, Chancery*, 611.]

THE CHANCELLOR.[2] The plaintiffs have shown a clear and undisputed right, by statute, to the taking of toll at the gates, and for the use of the turnpike road mentioned in the pleadings. They were, likewise, at the commencement of the suit, in the actual possession and exercise of that exclusive right; and the question is, whether the establishment of the open and common road, designated on the map by the figures 1, 2, 3, be not a disturbance of that right, amounting to a private nuisance.

The facts speak for themselves; and I think it is impossible for any person to cast his eye upon the map, which is made an exhibit in the cause, without being struck, at once, with the conviction that the injury is direct, palpable, and inevitable, and that, if no such turnpike gate existed, no such new road would have been purchased, made, and kept open.

It is, then, a plain case of a material and mischievous disturbance of the plaintiffs in the enjoyment of the statute privilege, which was granted to them by the legislature for public purposes, and founded on a valuable consideration.

The only question is as to the remedy, and this appears to me to be equally certain.

It is settled that an injunction is the proper remedy to secure to a party the enjoyment of a statute privilege, of which he is in the

[1] A preliminary injunction was refused in the following cases because the balance of convenience was against granting it. Cory *v.* Yarmouth Co., 3 Hare, 593 (monopoly of ferry); Elwes *v.* Payne, 12 Ch. Div. 468 (monopoly of market — defendant to keep account of sales).

But a preliminary injunction was granted in the following cases: McRoberts *v.* Washburne, 10 Minn. 23 (ferry); Midland Co. *v.* Wilson, 28 N. J. Eq. 537 (ferry); Livingston *v.* Ogden, 4 Johns. Ch. 48 (steamboat right on certain waters); Livingston *v.* Van Ingen, 9 Johns. 507 (steamboat right on certain waters). — ED.

[2] Only a portion of the opinion of the court is given. — ED.

actual possession, and when his legal title is not put in doubt. The English books are full of cases arising under this head of equity jurisdiction. Bush *v.* Western; Whitchurch *v.* Hide. But I need not enter into this discussion, for the point has been recently settled in this state, in the case of Livingston and Fulton *v.* Van Ingen and others,[1] and I shall rest upon the authority of that case, and upon the application of the principles on which it was decided.

The equity jurisdiction in such a case is extremely benign and salutary. Without it, the party would be exposed to constant and ruinous litigation, as well as to have his right excessively impaired by frauds and evasion.

If such a contrivance as this case presents is to be tolerated, all our statute privileges of the like kind, on which millions have been expended, would be rendered of little value, and the moneys have been laid out in vain.

I shall, accordingly, decree, that the defendants be perpetually enjoined from opening or using, or permitting to be opened and used, as a road for public use or travel, the road designated on the map by the figures 1, 2, 3; and that the same be closed up so as to hinder persons travelling on the turnpike road from using it as an open road; and that the defendants, except Frederick Graham, pay the costs of this suit; and that the bill, as to him, be dismissed.[2]

Decree

[1] 9 Johns. Rep. 507.

[2] The plaintiff's right to his monopoly and its infringement by the defendant being clear, a permanent injunction was granted in the following cases: Letton *v.* Gorden, L. R. 2 Eq. 123 (*semble* — ferry); Goldsmid *v.* Great Eastern Co., 25 Ch. Div. 511 (market); Wilcox *v.* Steele [1904], 1 Ch. 212 (*semble* — market); Conway *v.* Taylor, 1 Black, 603 (ferry); The Binghampton Bridge, 3 Wall. 14 (toll bridge); N. O. Co. *v.* La. Co., 115 U. S. 650 (supplying of gas); Collins *v.* Ewing, 51 Ala. 101 (ferry); Chard *v.* Stone, 7 Cal. 117 (ferry); Walker *v.* Armstrong, 2 Kan. 198 (ferry); Crescent *v.* N. O. Co., 27 La. An. 138 (supplying of gas); Broadway Co. *v.* Hankey, 31 Md. 346 (ferry landing); Boston Co. *v.* Salem Co., 2 Gray 1 (railway privilege); Challis *v.* Davis, 56 Mo. 25 (*semble* — ferry); St. Louis Co. *v.* N. W. Co., 69 Mo. 65 (railway privilege); Raritan Co. *v.* Delaware Co., 18 N. J. Eq. 546, 16 N. J. Eq. 321 (railway privilege); Newburgh Co. *v.* Miller, 5 Johns. Ch. 101 (turnpike); Mayor *v.* Starin, 106 N. Y. 1 (ferry); Patterson *v.* Wollman, 5 N. Dak. 608 (ferry); Dewar *v.* Smith [1900], S. Aust. 38 (ferry — injunction and damages).

Although plaintiff's franchise is not exclusive, he may have an injunction against one who competes against him without any authority from the state. East Hartford *v.* Hartford Bridge Co., 10 How. 511, 16 Conn. 149 (bridge); Newport *v.* Taylor, 16 B. Mon. 699 (ferry); McInnis *v.* Pace, 78 Miss. 550 (ferry — but compare Blewitt *v.* Vaughn, 6 Miss. 418 — bridge); Carroll *v.* Campbell, 108 Mo. 550 (ferry); Capital Co. *v.* Cole Co., 51 Mo. Ap. 228 (ferry); Cauble *v.* Craig, 94 Mo. Ap. 675 (ferry); Midland Co. *v.* Wilson, 28 N. J. Eq. 537 (ferry — temporary injunction); Smith *v.* Harkins, 3 Ired. Eq. 613 (ferry); Patterson *v.* Wollman, 5 N. Dak. 608 (*semble* — ferry); Douglass's App. 118 Pa. 65 (ferry); Tugwell *v.* Eagle Co. (Tex. 1888) 13 S. W. R. 650. — ED.

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